United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1113

To be argued by
DANIEL R. MURDOCK

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1113

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arboledea, LIBARDO GILL, aka Ramiro Estrada RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1113

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arboleda, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Francisco Adriano Armedo-Sarmiento, Edgar Restrepo-Botero, Leon Velez, Jorge Gonzalez, Libardo Gill, Ruben Dario Roldan, Carmen Gill, William Rodriguez-Parra and Olegario Montes-Gomez appeal from judgments of conviction entered on the date specified hereinafter, in the United States District Court for the

Southern District of New York, after a fourteen week trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment S 75 Cr. 429, filed April 30, 1975, in three counts, charged the above-named defendants, along with 29 others, with violations of the federal narcotics laws.* Count One charged all 38 defendants with a conspiracy to import cocaine into and to possess and distribute cocaine in the United States, in violation of Title 21, United States Code, Sections 846 and 963. Count Two charged all 38 defendants with the same conspiracy having the same objects but a different commodity, marijuana, subjecting defendants to a lesser penalty than Count One, in violation of Title 21, United States Code, Sections 846 and 963. Count Three charged Jose Antonio Cabrera-Sarmiento and appellant Edgar Restrepo-Botero with unlawfully, wilfully and knowingly using and carrying unlawful firearms to commit and during the commission of the felonies set forth in Counts One and Two in violation of Title 18, United States Code, Section 924(c).**

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* Indictment 75 Cr. 429 superseded Indictments 74 Cr. 817 (filed August 19, 1974), 74 Cr. 939 (filed October 4, 1974), and 74 Cr. 1128 (filed November 27, 1974). 74 Cr. 1128 in turn had superseded 74 Cr. 494 (filed May 11, 1974).

** Count Two was dismissed by Judge Cannella at the end of the government's case upon motion by each defendant. In dismissing Count Two, Judge Cannella held that as to no defendant on trial would the proof sustain a conclusion that he entered an agreement to distribute only marijuana but rather that he entered one agreement to import cocaine *and* marijuana if he entered any agreement at all. (Tr. 7053-58). The jury failed to agree on Count Three whereupon the Government consented to its dismissal on motion of defendant Botero.

Trial commenced on October 30, 1975, and on January 23, 1976, the jury returned verdicts of guilty on Count One against all nine appellants and the three other defendants on trial, Beatrice Gonzalez, Julian Carrion-Arco, and Gaston Robinson.* Judge Cannella imposed the following sentences on the following dates:

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* Defendants Beatrice Gonzalez, Robinson and Arco were tried and convicted *in absentia*. *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). Beatrice Gonzalez and Arco failed to appear at the commencement of trial. Robinson failed to appear November 24, 1975, and thereafter was tried and convicted *in abentia*. Twenty-two defendants are fugitive: Alberto Bravo, Griselda Blanco, Bruno Bravo, Jose Antonio Cabrerar-Sarmiento, Bernardo Roldan, Arturo Gonzalez, Carlos Marin, Ernesto Guello, Gilberto Rojas, Guillermo Palacios, Arturo Zapata, James Mario Gavirja, Cabriel Correa, Alvaro Cabrera-Sarmiento, Antonio Romero, Elsa Cabrera, Cesar Julio Riveros-Rincon, Ramiro San Cocho, Humberto Sandoval, Alberto Luis Herrera, Rhonda Sue Shirah, and Luis Estrada. Marconi Roldan pled guilty to Count One and received a sentence of 5 years, of which six months were to be spent in custody on weekends, and the remainder of which was suspended, 2 years probation, and 3 years Special Parole. The cases of Nina Nino and Oscar Perez were severed at the beginning of the trial. William Andries pled guilty to Count Two in the Southern District of Florida, pursuant to Rule 20, Fed. R. Crim. P., and received a suspended sentence of 5 years probation

Defendant	*Date of Sentence*	*Term of Imprisonment*
Armedo-Sarmiento	March 1, 1976	15 years and $25,000; 5 years Special Parole.
Leon Velez	March 1, 1976	5 years and $5,000; 3 years Special Parole.
Carmen Gill	March 1, 1976	10 years and $20,000; 5 years Special Parole (to run concurrent with sentence being served in State).
Librado Gill	March 1, 1976	10 years and $20,000; 5 years Special Parole (to run concurrent with sentence being served in State).
Restrepo-Botero	March 1, 1976	15 years and $10,000; 5 years Special Parole (sentence to run concurrent with 73 Cr. 729-5 years).
Ruben Dario Roldan	March 1, 1976	7 years and $5,000; 5 years Special Parole.
Jorge Gonzalez	March 4, 1976	7 years and 3 years Special Parole.
Rodriguez-Parra	March 5, 1976	10 years and 6 years Special Parole (sentence to run concurrent with 10 year Federal sentence being served in Texas).
Montes-Gomez	March 5, 1976	10 years and 6 years Special Parole (sentence to run concurrent with 10 year federal sentence being served in Texas).

Eight appellants are currently serving sentence and Velez is released on bail in the amount of $100,000.

Statement of Facts

The Government's case.

A. Summary.

From 1971 through October 5, 1974, appellants and their co-defendants and co-conspirators were members of a massive international narcotics organization which smuggled hundreds of kilograms of cocaine and literally tons of marijuana into the United States from Colombia, South America for distribution in New York City. The narcotics were either brought directly into New York City or indirectly, for example, through Miami, Florida; Texas; California; Germany and Toronto, Canada. Hundreds of kilograms of cocaine were smuggled into this country inside specially constructed false-bottom shoes, siutcases and dog cages, hollowed out coat hangers, double-lined girdles and bras and speedboats. The marijuana was brought in by the ton in speedboats, which had been loaded on the high seas, and in the false ceilings and walls of ocean going shipping containers.

The organization had its own laboratory and a sophisticated counterfeiter who manufactured bogus passports as well as the resources to manufacture devices to smuggle cocaine through United States Customs. Moreover, the hundreds of thousands of dollars of revenue which the organization generated were largely returned to Colombia to finance the continuing success of the enterprise.

The organization was headed and staffed in Colombia by four principal individuals: co-defendants Alberto Bravo, Bruno Bravo, Griselda Blanco and Bernardo Roldan. Alberto and Bruno Bravo controlled the organization and collected its profits. On the other hand,

Griselda Blanco and Bernardo Roldan recruited couriers to smuggle cocaine into the United States and provided them with the necessary smuggling devices and false travel documents.

Two of these couriers were appellants William Rodriguez-Parra and Olegario Montes-Gomez, men who delivered cocaine to co-defendant Pepe Cabrera and appellant Edgar Botero from Griselda Blanco.

Another courier was defendant Billy Andries who testified that he brought thousands of pounds of marijuana and tens of kilograms of cocaine into Miami for delivery to Cabrera from ships he met on the ocean between Miami and the Bahamas.

The organization distributed to a number of importers in New York City, among them Cabrera, co-conspirators Rev. Alberto Mejias and Mario Rodriguez, co-defendant Arturo Gonzalez and appellants Botero and Francisco Sarmiento. In turn, the importers employed wholesalers who stored the narcotics and distributed it. Among them were co-conspirator Henry Cifuentes-Rojas and appellants Ruben Dario Roldan, Libardo Gill, and Carmen Gill.

Members of the organization also employed assistants. In the case of Alberto and Bruno Bravo, they employed appellant Leon Velez to oversee the collection of their narcotics proceeds in the United States. In the case of Sarmiento and Arturo Gonzalez, they employed appellant Jorge Gonzalez to help them with arrangements, among other things, to import the ocean going containers in which were concealed tons of marijuana, the second commodity offered by the organization.

The principal Government witnesses at trial were Carmen Caban and Rita Ramos. Caban was a paramour,

successively, of two of the organization's importers, appellant Botero and co-defendant Cabrera, and a friend of Rita Ramos. Caban witnessed the narcotics dealings of Botero and Cabrera, among others, and occasionally delivered money and stored narcotics for them. Ramos was a wholesaler who was established in her own narcotics business by appellant Botero and continued to purchase from him. In addition, three undercover agents testified that they negotiated to purchase or purchased cocaine from members of the conspiracy. Dozens of federal agents and New York City Police Officers testified to innumerable surveillances of appellants and others and approximately 175 tape recordings and related English transcripts of conversations of some appellants and their co-conspirators documented the day-to-day operation of the organization during 1974.

B. A brief chronology

Carmen Caban lived with Edgar Botero from late 1971 through November 1972. Caban had met Botero, Cabrera, co-conspirator Hugo Diaz and Arturo Gonzalez while working for approximately three years as a barmaid for co-conspirator Morty Carlin and knew each of them to be high-level narcotics dealers who sold to Carlin the marijuana and cocaine he distributed in his bars.

While Caban lived with Botero, and earlier, she accompanied him and Cabrera when they made kilogram deliveries of cocaine to their wholesalers. She was also told by Botero how to understand the code that was used in discussing narcotics over the telephone for those occasions when she took messages for him, as she did from co-conspirator Oscar Catiri, Blanco, Cabrera and Arturo Gonzalez (Tr. 1281).* In addition to taking messages, Caban was present at least six times when Botero re-

* "Tr." refers to pages in the official transcript, "GX" refers to Government's exhibits; "No. . . . ., [date]" refers to the number of a recorded conversation admitted into evidence.

ceived couriers at his apartment and she watched as they unpacked kilograms of cocaine. (Tr. 1262, 1235-44). Two of the couriers Caban met in this way were appellants Parra and Gomez, who remained in New York a few days after each delivery before returning to Colombia (Tr. 1235-44, 1254-58, 1265).* It is no surprise that Botero's profits from this business were substantial. On one occasion Arturo Gonzalez and Rita Ramos delivered to him about $50,000 for cocaine he had sold them. (Tr. 1310-11).

Before Caban stopped working for Carlin and began living with Botero, Rita Ramos had herself begun to sell marijuana and cocaine, at first while working for Carlin and later full time. Ramos had met Cabrera, Hugo Diaz, Botero and Arturo Gonzalez while managing Carlin's bars, and was introduced to the narcotics trade in her own right by Botero, who taught her how to dilute, weigh and package cocaine which he sold to her weekly.

In July 1972, Caban went to Colombia for Cabrera and Botero to deliver $16,000 to Alberto Bravo and Oscar Catiri (Tr. 1161-64). While she was in Colombia, Caban met for the first time Griselda Blanco, a woman she had only spoken to before when taking messages for Botero concerning the departure to New York of couriers Blanco was sending with cocaine. In Colombia, Blanco showed the factory where women couriers were fitted with smuggling devices (Tr. 1168) and Caban learned that the organization had a laboratory for processing cocaine (Tr. 1610-11). In addition, while she was in Colombia, Caban met Alberto Bravo a second time in

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* Parra and Gomez were arrested in June 1973 in Texas bringing another delivery of cocaine to Cabrera, Oscar Catiri and Botero from Griselda Blanco. (Tr. 1447-52).

the company of Blanco and Cabrera, who thereafter discussed ways of smuggling cocaine into the United States (Tr. 1166-7).

Upon her return to the United States in August 1972, Caban resumed a life virtually the same as she had experienced before. Cabrera and Botero, who were sometimes referred to as "El Tio", the uncle, and "El Sobrino", the nephew, continued their constant companionship in their narcotics business. While Caban was living with Botero, couriers continued to deliver cocaine from Colombia to Arturo Gonzalez, Cabrera and Botero in New York. Again Caban watched as the cocaine was unpacked and helped count the proceeds of its sale. On several occasions prior to Caban's arrest in July 1973, she helped count money totalling as much as $50,000 each time and helped launder it into money orders to be carried or mailed to Colombia (Tr. 1445).

In late 1972, Botero formed an intimate relationship with Anne Sanjurjo who helped him distribute his cocaine, and Caban left him. Shortly thereafter, she took a second trip to Colombia for Cabrera, this time to deliver $20,000 to $30,000 to Griselda Blanco (Tr. 1304-06, 1309, GX 35, 1316-20). During this trip, Blanco introduced Caban to Bernardo Roldan with whom Blanco placed an order for false passports for couriers (Tr. 1169, 1393, 1422). Caban learned that Blanco and Roldan, as well as Alberto Bravo and Oscar Catiri were Cabrera's source for the cocaine and marijuana he sold (Tr. 1730).

Upon her return to New York City, Caban resided with Cabrera. From then until her arrest in July 1973, Cabrera received an average of three kilograms of cocaine per week which he sold at an average of $24,000 each (Tr. 1424). On one occasion, Cabrera and Alberto Bravo

reviewed Cabrera's accounts of his narcotics sales in Caban's presence (Tr. 1525-26).

Rita Ramos continued to sell cocaine throughout this period and just prior to Caban's arrest in July 1973, Ramos was arrested. Thereafter, she cooperated with the police and provided information that led to the arrest of Caban. At the time of Caban's arrest, the police seized from her apartment two kilograms of cocaine, 3 revolvers * and approximately $16,000 in cash and money orders (Tr. 1505-06). At the time, documents were also seized that reflected cocaine sales totalling over a hundred kilograms of cocaine (GX 116).

In the same month of Caban's arrest, July 1973, Detective Luis Ramos began to negotiate cocaine purchases from co-conspirator Lilia Prada, whose source the police later learned was Mario Rodriguez. There is no evidence Mario Rodriguez ever did anything but distribute cocaine and he had been living in New York since October of 1972 (GX 182).**

Not all the deliveries of cocaine that the organization received were delivered in New York City. On several occasions during 1973, Caban accompanied Cabrera to

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* These weapons were the basis of Count Three of the Indictment.

** Mario Rodriguez was not the only co-conspirator other than those previously mentioned who was in New York City operating earlier than 1974, when their presence was first noted by the police, Mejias entered the United States at San Juan, Puerto Rico on September 19, 1973 (GX 27). Co-conspirator Rojas lived in the apartment used as Sarmiento's stash from as early as May 2, 1973 (GX 319D), Carmen Gill had negotiated to sell cocaine to Detective John DeRosa in December, 1972 (Tr. 1942-43), and Libardo Gill entered the United States at San Juan, Puerto Rico on November 18, 1971 (GX 22).

Puerto Rico and Miami, Florida where Cabrera received as much as nine kilograms of cocaine that he then carried back to New York City where it was sold. (Tr. 1429, 1433-34, 2357).

Botero also travelled to Miami for cocaine. Shortly before his arrest in July, 1973, he, Cabrera, Caban and Oscar Catiri brought one kilogram of cocaine back to New York City from Miami, Florida. (Tr. 1503).

While Cabrera was on trips to Miami in late 1973, after Caban's arrest, he maintained his contacts with Botero in New York and Blanco and Alberto Bravo in Colombia (Tr. 2409, 2427-28), and continued to receive deliveries of as much as twenty-eight kilograms of cocaine and 2000 pounds of marijuana, all of which was destined for New York City. (Tr. 2001-09, 2347-2386, 2392-2401).*

While Cabrera was making occasional trips to receive cocaine that he was importing through Miami, Rita Ramos was selling cocaine in New York City at a high volume until her second arrest in January, 1974. (Tr. 821-3, 950, 974). Indeed, at the time of her arrest, the police seized cocaine and over $43,000 in cash from her apartment. (Tr. 992).

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* This delivery was one of approximately four brought into Miami by Andries for Cabrera beginning in December 1972. With respect to a single delivery—consisting solely of marijuana—Andries testified that the source was a *second* Alberto Bravo ("Bravo II"). As to the remaining shipments, some of which included cocaine, there is no evidence concerning his source, although Cabrera's continued contacts with the first Alberto Bravo suggest that he remained at least as Cabrera's prime source of cocaine. (Tr. 1993-1999, 2030, 2216-17, 1455-57). At any rate, there is *no* evidence that "Bravo II" was the source of more than one shipment.

In February or March, 1974, after Rita Ramos' arrest, Cabrera received his last delivery of marijuana with Andries' aid. This shipment, like the others, was taken to New York City. (Tr. 2017-18).*

The evidence established beyond any question that the major importers in this case, Cabrera, Arturo Gonzalez, Sarmiento, Mejias and Mario Rodriguez were fully aware of each other's role in the organization and that they all operated for Alberto and Bruno Bravo and received the assistance of Griselda Blanco and Bernardo Roldan. Sarmiento had met Mario Rodriguez in Miami prior to mid-February, 1974, and a short while later, in New York, contacted him to reach Alberto Bravo with whom he had to discuss Bernardo Roldan, a close friend of Sarmiento's (No. 1026, 2/13/74, 1632, 2/24/76). In the next two weeks, Sarmiento was contacting Rodriguez' telephone frequently to discuss deliveries of cocaine (Nos. 1523, 2/22/74; 1646, 2/25/74; 1711, 2/26/74). Indeed, the very next day, Alberto Bravo, Mejias, Sarmiento and Bernardo Roldan had a meeting to discuss the arrival of a shipment of 2½ kilograms of cocaine. (No. 1760, 2/26/74). About three weeks later,

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* Andries offered his cooperation to the authorities in November 1974, after having received between 1¼ and 1½ million dollars for sales of marijuana and cocaine to Cabrera (Tr. 1977, 2024). However, it is clear that Andries' role was limited to that of a high volume courier because the organization continued to receive cocaine in Miami, just as before, for distribution in New York City after his arrest. For example, in May, 1974, Sarmiento and Mario Rodriguez discussed the risks of going to Miami to pick up the cocaine which was available there and resolved to call appellant Libardo Gill to try to get someone who would make the trip. (No. 231, 5/9/74). In addition to Cabrera, Sarmiento and Mario Rodriguez, Mejias also occasionally obtained his deliveries of cocaine from the organization through Miami, particularly in the middle and late months of 1974. (GX 341, GX 326).

Alberto Bravo used Rodriguez' telephone to call Bernardo Roldan at Sarmiento's apartment and discussed appellant Libardo Gill's narcotics operation. (No. 172, 3/15/74).* Moreover, this was not the first time Alberto Bravo had been with Mario Rodriguez. (Tr. 3678-80; GX 180).

On March 18, 1974, Sarmiento again met with Alberto Bravo and discussed a shipment of narcotics with Bruno Bravo. (No. 389, 3/19/74). In addition, Sarmiento, Arturo Gonzalez, appellant Jorge Gonzalez, Mejias and Bruno Bravo each contributed to Sarmiento's success in importing eight trailer-size containers of furniture, from the walls and ceilings of one of which was seized nearly a ton of marijuana with a wholesale price ranging from $500 to $650 per pound. (*e.g.*, No. 146, 5/7/74; Tr. 6247-50 6280-84, GX 440, GX 440A-F; GX 480-489; GX 482A; GX 484A-B; GX 485A-B; No. 107, 5/6/74).

In addition, Cabrera and Sarmiento and others were importing cocaine from Alberto and Bruno Bravo during the same period of time. Thus, on April 19, 1974, Oscar Cabri, the man Carmen Caban met in Colombia with Alberto during the time she was living with Botero, was arrested at JFK International Airport in New York with Cabrera's girlfriend who was carrying two kilograms of cocaine. (Tr. 2666-8, 2678-80).

On May 3, 1974, another meeting to discuss the organization's narcotics business was held at Sarmiento's apartment. Sarmiento, Bernardo Roldan, co-defendant Marconi Roldan and Arturo Gonzalez were present. Later that evening at another location, a second meeting was held between Sarmiento, Bernardo Roldan and his two

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* At the time of the arrest of the Gills, accounts were found which listed a payment to or money due to Alberto Bravo of $131,200. (GX 365).

nephews, Marconi Roldan and appellant Ruben Dario Roldan. (Tr. 4416, 4526-29, 4418-4421).*

The evidence concerning other participants also revealed the frequent contacts among the importers of the organization. For example, on June 11, 1974, Arturo Gonzalez and Cesar Riveros Rincon had a meeting near Sarmiento's apartment. Nearly two years earlier, on September 15, 1972 and thereafter, Rincon and Arturo Gonzalez in the presence of appellant Botero negotiated to sell undercover detective Arthur Drucker part of a five kilogram delivery of cocaine they were expecting from Colombia (Tr. 775-80, 784-89, 799, GX 7).**

Sarmiento and Libardo Gill also maintained a business relationship with Cabrera and knew that to contact him if necessary he could be reached either in Miami or New Jersey.*** (No. 437, 5/16/74). They were also aware

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* This and other evidence thus showed that Sarmiento relied upon the same people in Colombia as Botero had done until his arrest and Cabrera continued to do. (No. 88, 5/6/74). Indeed, Sarmiento was aware not only of the Bravos and Bernardo Roldan, but also of the participation of Cabrera, Botero and Griselda Blanco (E.g., No. 134, 5/7/74; No. 37, 5/13/74; No. 686, 5/24/74). Sarmiento discussed receiving payment from Botero and having him obtain delivery of cocaine. (E.g., No. 444, 5/16/74; No. 479, 5/17/74). Indeed, Sarmiento was aware of Botero's arrest on May 21, 1974, within less than two days after it occurred. (No. 664, 5/23/74; see also No. 441, 7/6/74; No. 465, 7/7/74)

** The evidence is uncontroverted, therefore, that Botero remained a member of the organization from 1972 until his arrest in 1974. Indeed, the evidence even established that Mario Rodriquez felt it as necessary to disguise his knowledge of Botero and of Sarmiento by keeping the telephone numbers of each in code. (GX 537). This also demonstrated the connection between Botero and Rodriguez.

*** Pepe Cabrera ("El Tio") leased an apartment on May 1, 1974, in Fort Lee, New Jersey (GX 60).

of the position Arturo Gonzalez held in the conspiracy. On June 10, 1974, Arturo Gonzalez and appellant Libardo Gill met at Sarmiento's apartment to discuss the narcotics business. (Tr. 5089-91, 4694). Further, in June, 1974, Sarmiento made arrangements for Bernardo Roldan to deliver false passports to Carmensa Gomez and Raul Diaz, two couriers who were later arrested, on July 11, 1974, with one kilogram of cocaine destined for Mario Rodriguez. (No. 20, 6/29/74; No. 119, 7/1/74; No. 531, 7/8/74; No. 696, 7/11/74; Tr. 5179-5202).

The career of Hugo Diaz further demonstrated the relationship among the importers. Hugo Diaz was known well to both Carmen Caban and Rita Ramos from his sales to Monty Carlin while they were still barmaids. (Tr. 199, 205, 218, 1138-39, 1146-49). He was also well known to Botero and his paramour, Anne Sanjurjo. (Tr. 1846, 51, GX 47, 47A). It is not surprising, therefore, that when Mario Rodriguez' own deliveries of cocaine failed to reach him because, for example, of the earlier seizure from Daniel Torres of several kilograms of cocaine, he should reach out to another member of the organization. Thus, on July 10, 1974, Mario Rodriguez and his wife Estella purchased approximately a half kilogram of cocaine from Hugo Diaz for $12,500. (No. 618, 621, 686, 7/10/74; Tr. 5037-42). Similarly, Alvaro Hernandez ("Valmore") was an early associate of Cabrera, Botero, Caban and Rita Ramos. (Tr. 274, 331, 605). Indeed, Rita Ramos once attended a business meeting with Botero and Hernandez in 1973 (Tr. 274).*

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* Other facts showed the key relationship of Hernandez to the group of importers this organization stationed in the United States. The evidence proved he was known not only to Caban, Ramos and Botero in 1973, but to Libardo Gill, Carmen Gill, Cabrera and Mario Rodriguez in 1974. Mario Rodriguez mentioned his arrival in New York on July 12, 1974 (No. 760,

[Footnote continued on following page]

The final demonstration of the organized nature of the enterprise came in late 1974, when intercepted conversations established that Mario Rodriguez not only knew of Griselda Blanco's role in the conspiracy but relied on Cabrera to replenish his supply of cocaine. (No. 727, 9/2/74; No. 169, 9/18/74; Nos. 617, 642, 9/25/74; No. 1089, 10/3/74). Indeed, conversations following Sarmiento's arrest on September 3, 1974, established that Mario Rodriguez also knew that Arturo Gonzalez was an important figure at the highest level in the organization. (No. 893, 9/5/74).

The arrest of Mejias on September 3, 1974, not only established the massive volume at which the organization moved cocaine through each importer, but confirmed that the importers relied upon each other at times for the cocaine to sell to their wholesalers. Thus, 15 bags containing residue of cocaine and $111,000 were seized in Mejias' apartment as well as accounts showing kilogram quantity sales of cocaine to, among others, Mario

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7/12/74). Later, on August 23, 1974, shortly after a meeting with Mario Rodriguez, Hernandez was arrested. In his possession was a telephone book containing numbers of the Gills and of Cabrera's Fort Lee, New Jersey apartment. (GX 198A). Moreover, following Hernandez' arrest, Mario Rodriguez contacted him and attempted to have his bail lowered. Indeed, Rodriguez consulted with associates meeting in Miami with Cabrera and Griselda Blanco and was told Cabrera had sent Hernandez the telephone number of an attorney. A few days later, Rodriguez called Cabrera in Miami and again discussed arrangements with Cabrera which the latter had made to obtain Hernandez an attorney. (Nos. 238, 241, 246, 256, 267, 286, 8/23/74; Nos. 299, 343-345, 8/24/74; No. 507, 8/29/74). Even Arturo Gonzalez was concerned over Hernandez' arrest. (No. 727, 9/2/74). Finally, the efforts to have Hernandez released on bail were successful, but to no avail. He was rearrested on October 4, 1974, in Mario Rodriguez' apartment (Tr. 6402-08), again with a telephone book containing the number of Cabrera's New Jersey apartment (GX 540).

Rodriguez, Sarmiento and "Pepe" Cabrera. (GX 321-341). Moreover, as an indication of the scale of the conspiracy, in a safe deposit box, Mejias had stored an additional $26,700 (GX 342-345).

The scale of this organization's operations was also indicated by evidence seized at the September 30, 1974, arrest of Libardo and Carmen Gill. In addition to $21,000 that the Gills offered the police as a bribe to release them, the police seized an additional $50,000 in cash, $72,500 in money order receipts, 19 pounds of marijuana, approximately $12,500 worth of cocaine and accounts disclosing sales of cocaine totalling hundreds of thousands of dollars. Moreover, an additional $65,500 was seized from a safe deposit box of Carmen Gill (GX 350-365, 378-82). An examination of the accounts reveals that the source of the Gills' cocaine and marijuana was Alberto Bravo and Sarmiento and that among other payments the Gills had paid Alberto Bravo $131,200. (GX 365).

Finally, when the police raided Cabrera's New Jersey apartment on the same day as the arrest of Mario Rodriguez, although Cabrera was never apprehended, the police seized documents listing nicknames of Alberto Bravo and Sarmiento (GX 420), Alvaro Hernandez, Arturo Gonzalez, Oscar Catiri and Mejias (GX 416, 425) and evidence of the purchase of money orders later deposited in the account of Bruno Bravo. (GX 426, 428, GX E-163C-1).

The defense case.

A. Summary.

Only one defendant, appellant Leon Velez, testified in his own defense. He sought to explain the wiretapped conversations and surveillances in a way consistent with

his innocence by denying any knowledge of the existence of the conspiracy and claiming his relationship to co-conspirators was purely social. In addition, he called two character witnesses.

Appellants Botero, Parra and Roldan and fugitive defendants Beatrice Gonzalez and Robinson sought through interpreters and stipulation to establish, for example, they had not admitted meeting certain co-conspirators, or had very common names. Botero called an interpreter and an investigator, each native Colombians, to testify whether or not Botero's nickname, "El Cacheton" was a common one. The interpreter knew no one other than the defendant with that nickname; the investigator stated he knew ten people with the nickname, but could not name or describe a single one. (Tr. 7195-96, 7206, 7222).

In addition, Botero established, among other things, that after Carmen Caban's arrest she told police the weapons which were the subject of Count Three of the indictment belonged to someone other than Botero, the only defendant on trial charged with using them. (Tr. 7103-08).

Appellant Gomez, to impeach an in-court identification of Gomez by Caban, called witnesses who testified that the first time Carmen Caban examined a photo spread including a photograph of Gomez, she did not say she could identify him. (Tr. 7518-19). However, Gomez also called a witness who testified to a subsequent occasion when Caban did identify the photograph of Gomez. (Tr. 7504-08, 7520-27).

Appellants Sarmiento and Libardo Gill, to try to challenge the testimony of officers who stated they would see Sarmiento and others in Sarmiento's apartment at

various times, called a private investigator who had difficulty seeing into the apartment but who had not tried to recreate the conditions as they existed when the police made their surveillances. (Tr. 7534-43, 7563-74).

Appellant Jorge Gonzalez called an alibi witness who testified that Gonzalez was an outside jewelry salesman for his employer but that he had never seen him in the store before August 1974 and had never seen him sell anything. (Tr. 7577-88). In addition, a character witness testified that he had never heard any ill statements of Gonzalez. (Tr. 7589-92).

Appellant Carmen Gill and defendant Arco presented no defense.

3. The Velez defense.

Velez testified in sum that he had no knowledge of the narcotics conspiracy with which he was charged. Although he admitted he knew Sarmiento and the Bravo brothers—indeed, that he had known the latter for 30 years (Tr. 7302, 7304)—he claimed that the relationship to them was purely social. In particular, Velez attempted to make an innocent explanation of the meaning of his various wiretapped conversations. Further, while he admitted meeting Sarmiento on May 9th and receiving a box from him, as proved in the Government's case, he claimed that he received the box only as a favor to Bruno Bravo, who was receiving the money in liquidation of a legitimate business.

Government's rebuttal case.

The Government recalled Assistant United States Attorney, James Nesland who testified, without objection, to a post-arrest interview of Velez he conducted on Oc-

tober 7, 1974. Velez said that the only thing he had done while Alberto Bravo was in New York was to try and get him a doctor. Velez also stated that Alberto Bravo was in the black market money business in Colombia. Velez stated he had a conversation with Sarmiento concerning money orders in which Sarmiento asked the best way to send approximately $12,000 to $13,000 to Alberto Bravo. Velez told Sarmiento the best way to send it was by money order. Velez denied he ever had any conversation with anyone, except one with Sarmiento, about buying money orders to send to Alberto Bravo and denied having anything to do with sending money orders from Sarmiento to Alberto Bravo. Moreover, he had never sent any documents or papers of any kind to Alberto or Bruno Bravo. Velez said he never received any money from Sarmiento, never gave any money to him and never had any conversation along those lines with him. (Tr. 7709-44).

ARGUMENT

POINT I

Sarmiento's motion to suppress tangible evidence was properly denied without a hearing

On October 10, 1975, only ten days before the second scheduled trial date and after months of pre-trial proceedings, Sarmiento moved to suppress evidence that he claimed had been illegally seized from Apartment 6A, 327 West 30th Street in Manhattan. He subsequently renewed his motion to suppress during the course of the trial (Tr. 5717-57A). (Appellants' Joint App. at 165a-169a). Judge Cannella properly denied the motion without a hearing on each occasion on the grounds that Sarmiento had no standing and had waived his motion

because of gross untimeliness (10/15/75 Tr. 49; Tr. 5719). These rulings were unquestionably correct.

Initially, it should be noted that Judge Cannella's denial of the motion for untimeliness was entirely supported by the record, and was well within the District Court's discretion—rendered especially important in the context of an extraordinarily lengthy and complex multi-defendant case—to control the timing of a criminal proceeding. On May 22, 1975, Judge Cannella ordered that defense motions had to be filed by June 9, 1975 (5/22/75 Tr. 12). Sarmiento did not serve his suppression motion papers on the Government until October 15, 1975 (10/15/75 Tr. 43). In discussing the untimeliness of the motion, Sarmiento's counsel did not deny that he had known about the potential issue weeks before (10/15/75 Tr. 46). Indeed, Sarmiento's counsel represented him in state court on an identical motion to suppress and admitted that he was aware of the evidence seized "some time at the beginning of the summer". (10/15/75 Tr. 47, 50).*

Judge Cannella's denial of Sarmiento's motion on the ground that he had waived his right to make it (10/15/75 Tr. 47, 48) was thus proper, especially since Judge Cannella found Sarmiento's counsel knew about the potential issue months before (10/15/75, Tr. 47). *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. — (U.S. Feb. 23, 1976) (and cases cited therein); *United States* v. *Sisca*, 503 F.2d 1337, 1347-8 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). See Rule 12, F. R. Crim. P. (effective until November 30, 1975), and Rule 41(f), F. R. Crim. P.

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* See *People* v. *Salazar*, 8 Misc. 2d 922, 373 N.Y.S. 2d 295 (Sup. Ct. N.Y. Co. 1975).

Furthermore, the papers filed on behalf of Sarmiento were so defective as to call for immediate denial. In support of his motion, Sarmiento submitted only an affidavit of his attorney based upon information and belief.* This Court has explicitly held that the affidavit of defense counsel on information and belief is insufficient to raise an issue of fact in order to obtain a hearing. *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967); see also *Cohen* v. *United States*, 378 F.2d 751, 760 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967) (and cases cited therein). In addition, the affidavit filed was unaccompanied by a memorandum of law stating defense counsel's view of the relevant facts and of the controlling law.**

Finally, even if the District Court were to have based its ruling on the allegations made by defense counsel, the ruling—and the denial of a hearing—were eminently correct, since Sarmiento totally failed to meet his burden of demonstrating that he had standing to complain of the search. *Brown* v. *United States*, 411 U.S. 23 (1973). As this Court has recently reaffirmed, Sarmiento had no standing to contest a search and seizure since he "(a) [was] not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *United States* v. *Tortorello*, 533 F.2d 809, (2d Cir. 1976),

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* The affidavit did not even state that the "information and belief" was based directly upon knowledge of the defendant or, indeed, of anyone else with knowledge.

** Rule 9(b) of the General Rules of the Southern District Rules requires the filing of a supporting memorandum along with any motion. "Failure to comply may be deemed sufficient cause for the denial of the motion. . . ."

quoting *Brown* v. *United States*, *supra*, 411 U.S. at 29. Sarmiento's moving papers utterly failed to meet any of these tests.*

Thereafter, Sarmiento never presented the Court with any facts even remotely tending to show he had standing. Nevertheless, on the basis of the evidence introduced during the trial, Sarmiento renewed his motion to suppress. Judge Cannella properly denied it. At the time of his renewed motion, Sarmiento's lawyer asserted, without detailing the evidence upon which he based his conclusion, that the evidence showed Sarmiento lived at the apartment. After listening to the Government's review of the evidence, during which the Government contended that there had been no proof who the tenant was, Judge Cannella again found Sarmiento had no standing (Tr. 5719). This ruling was obviously correct. The only evidence concerning Sarmiento's connection with the apartment were observations of Sarmiento entering and leaving the apartment on two occasions two months apart, neither of which was on the day of the search, and recordings of two telephone calls by Sarmiento, one to and one from the apartment. Sarmiento has cited

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* Indeed, as proof of Sarmiento's standing, his counsel merely asserted that "Government counsel has stated that the defendant was seen entering and leaving the apartment on a number of occasions" and speculated that the Government would in the future claim that Sarmiento was an "inhabitant and had a possessory interest in the apartment". (Sarmiento motion, Affidavit of Paul E. Warburg at 5, sworn to October, 1975, Appellants' Joint App. at 168a). At a pre-trial conference on the motion, the Government stated, to the contrary, that Sarmiento was not a resident of the apartment and that the Government's proof would not establish standing to pursue the motion (10/15/75 Tr. 44). Thus, Judge Cannella had no facts before him on which to make a finding that there was even a question, much less a showing, of standing.

no authority which supports a finding of standing on such meager evidence. On the contrary, such intermittent use invested Sarmiento with no right of privacy in the apartment. See *United States ex rel. Laws* v. *Yeager*, 448 F.2d 74, 85 (3d Cir. 1971), *cert. denied*, 405 U.S. 976 (1972).* See also *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).**

It follows that even had Sarmiento properly raised this issue of the search in the trial court, there was absolutely no evidence upon which he could properly base his claim of standing. Furthermore, since Sarmiento never properly alleged facts as to standing which, if proved would have required a hearing, no hearing was necessary. *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969). See also *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960).

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* In *Yeager*, a defendant who was not present during the search but who specifically alleged that he occasionally borrowed a particular automobile, and who, on appeal, contended that he used the car for purposes of the crime in question, was denied standing to challenge the search of the car.

** Sarmiento did not renew his motion to suppress after the documents seized in the apartment were introduced into evidence. Moreover, no document suggested Sarmiento had any possessory or proprietary interest in the apartment. Indeed, the documentary evidence established that the lessee of the apartment was Carlos or Oscar Vega and that he had been the lessee since May, 1973 (GX 319C). The evidence was overwhelming that during a three-month period, Sarmiento resided at 215 East 64th Street, Apartment 10F (GX 181; No. 130, 5/7/74; *e.g.*, Tr. 3434-3437) and that afterwards, during his one-month trip to Colombia to organize further shipments to the United States of cocaine and marijuana, the 30th Street apartment continued to be rented by Carlos Vega. Furthermore, rent receipts and identification documents seized were all in names other than those by which Sarmiento was known or by which he referred to himself (*e.g.*, GX 319C, 319D).

POINT II

No evidence was illegally obtained from the Gills.

Carmen and Librardo Gill contend that Judge Cannella erred in failing to grant their motions to suppress five bags of cocaine, 19 bags of marijuana, $70,000 in cash and another $70,000 in money order receipts plus miscellaneous narcotics paraphernalia and documents found in their apartment at 580 Amsterdam Avenue at the time of their arrest. (Gill Br., Point I). This argument is without substance.

A. Facts.

On October 16 and 17, 1975, Judge Cannella conducted a hearing on the Gills' suppression motions. In an opinion dated October 31, 1975, Judge Cannella denied the motions. *United States* v. *Bravo*, 403 F. Supp. 297 (S.D.N.Y. 1975).*

Judge Cannella found that at approximately 2:30 P.M. on September 30, 1974, Detective Richard Powers and Sergeant Gerald McQueen, Commanding Officer of the Manhattan Homicide Task Force of the New York City Police Department, visited the apartment at 580

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* References preceded by "H. Tr." are to pages in the transcript of the suppression hearing. Much of the testimony at the suppression hearing as to the Gills' apartment and the positions and movements of the police and the Gills within the apartment was given in terms of a blackboard diagram of the apartment. A copy of that diagram, which was included as an Appendix by Judge Cannella to his memorandum decision on the Gills' suppression motion, is printed at 403 F. Supp. 305, and is hereinafter referred to as the "diagram."

Amsterdam Avenue for the purpose of interviewing the residents of the apartment about the homicide of one Luis Ramos. The apartment address and telephone number had come to the attention of the Task Force during the course of the homicide investigation. 403 F. Supp. at 299.

When they knocked on the door and announced their identity Gill opened the door and invited them into the apartment. Judge Cannella concluded that "Libardo Gill freely and voluntarily allowed them [the officers] to enter his apartment," 403 F. Supp. at 302, and the Gills do not challenge that finding in this Court.*

When Officer Powers and Sgt. McQueen were let into the apartment by Mr. Gill, Mrs. Gill was sitting in the living room at a kitchen table, about four feet from them.** On the table were two marijuana cigarette butts.

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* Judge Cannella further found that the homicide investigation was conducted in good faith, and was not a ruse designed to create an entry into the apartment. 403 F.2d at 299, n.1. This conclusion is also not contested on appeal.

** The living room of the apartment was only approximately 11 feet from wall to wall (Powers, H. Tr. 100). The kitchen was only five or six feet by seven or eight feet. (Powers, H. Tr. 173). A hallway ran straight from the living room to the bedroom in the rear of the apartment. Next to the living room, the Gills' kitchen opened off of the hallway to the left and the Gills' ice box was on the right of the hallway, if one were to look into the hallway from the living room. Next to the kitchen was the bathroom, and across the hall from the bathroom was a closet (Powers, H. Tr. 95; diagram).

There was no door on either the hallway (Powers, H. Tr. 224) or the kitchen, so that both were open to the living room. Powers estimated that it would take only 11 normal steps to go from the front wall of the living room across the living room, down the hallway and into the bedroom (H. Tr. 100).

Indeed, Detective Powers testified that from the entrance way of the apartment he could see into some of the kitchen, including the locations of a bag of marijuana or cocaine (H. Tr. 99, 124-25), although in fact he didn't notice the bag until he began a security check of the apartment.

Powers asked the Gills, "Whose cigarettes are these?" and the Gills indicated that they did not know. The Gills were then placed under arrest. 403 F. Supp. at 299-300; (Powers, H. Tr. 77-91, 215-220; McQueen, H. Tr. 232-34).

Next Detective Powers said to Sgt. McQueen, "Let me check and make sure nobody else is in the apartment" (Powers, H. Tr. 91). Powers then took approximately one or two steps from the living room into the hallway, to a point marked "K" on the diagram (Powers, H. Tr. 98; diagram), and from there Powers noticed bags of marijuana and cocaine standing in plain view just inside the kitchen, with bricks of marijuana sticking four or five inches out of one of the bags (Powers, H. Tr. 98-100; diagram).

At that time, Mrs. Gill, who was still sitting at the table, with her back against the rear wall of the living room, was by Powers' estimate "a little short of five feet, approximately" from the nearest bags of cocaine and marijuana in the kitchen (H. Tr. 223). Mr. Gill was "maybe six foot" from Mrs. Gill toward the center of the living room (Powers, H. Tr. 97; diagram), while Powers was only a foot and a half to two feet from the bags (Powers, H. Tr. 195). Thus, Powers was between Mr. and Mrs. Gill, and within a few feet of each of them, when he noticed the bags of marijuana and cocaine in the kitchen. The District Court described McQueen's reaction to the observation in the following terms:

> His attention having been drawn to the bags, Sgt. McQueen walked into the kitchen and glanced down into them, also noticing the bricks and a bag of white powder. However, nothing was removed from the bags nor were they disturbed in any other manner.

403 F. Supp. at 300. The officers then completed a brief "walk through" of the small apartment—during which nothing was opened, searched or seized in any way—and returned to the living room. There, the Gills proceeded to offer the agents large sums of money, some of which was in evidence in the room, if they could be allowed to escape. The officers—who very shortly thereafter reported the bribe offer to the Internal Affairs Division of the Police Department—pretended that the offer was insufficient, and Carmen Gill then removed a shoe box full of money from a shelf and eventually gave more than $20,000 to the officers. At approximately 4:00 P.M., one officer left to obtain a search warrant and returned with one at approximately 7:00 P.M. During his absence, no further search of the apartment was made. Upon the arrival of the search warrant, the cocaine and marijuana that had been observed earlier, together with other narcotics paraphernalia and large sums of money, were seized. See 403 F. Supp. at 301, n.8.

B. Argument.

The Gills present a barrage of contentions in support of their basic argument that the fruits of the search—including both the narcotics, the narcotics-related material, and the bribe offer—should have been excluded from evidence. In particular, they allege (a) that the discovery of the marijuana and cocaine was the product of an illegal initial search of the apartment; (b) that the subsequent search and seizure pursuant to a search warrant was tainted by the initial search, was overbroad and was based upon an allegedly perjurious affidavit that did not establish probable cause; and (c) that their offer to bribe the police should have been suppressed as "the product of" the allegedly illegal initial search. At the outset, it is important to note what the Gills do *not* contest. They appear to concede

that the officers properly entered the apartment, and properly arrested the Gills in the living room. They further appear to concede that if Officer Powers was constitutionally permitted to be at the spot (marked "K" on the diagram) from which he saw the marijuana and cocaine he was permitted to inspect those materials as being in plain view.* In essence, their argument boils down to a contention that the several steps that Powers took—in utter good faith—from his initial position in the living room to the corridor of the apartment were illegal, and that the entire subsequent series of events—including the inspection of the narcotics, the bribe offer and the search warrant—were tainted by those steps.** This argument is unsound.

1. The security check at the apartment.

The Gills argue here that Powers' quick check of the apartment was an unreasonable search and that every-

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* At any rate, the numerous decisions in this Circuit upholding the validity of a "plain view" search make clear the lawfulness of the observation of the narcotics permissible, once it is established that the officers were legally in a place from which the view was made. *United States* v. *Montiell*, 526 F.2d 1008, 1010 (2d Cir. 1975); *United States* v. *Morrell*, 524 F.2d 550, 555-56 (2d Cir. 1975); *United States* v. *Rollins*, 522 F.2d 160, 166 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. (U.S. February 23, 1976); *United States* v. *Pacelli*, 470 F.2d 67, 70-71 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). Indeed, under the circumstances of this case and the decisions in this Circuit, the officers would have been permitted to *seize* the narcotics that were in plain view. *United States* v. *Canestri*, 518 F.2d 269, 274-75 (2d Cir. 1975). Here, as the District Court noted, the agents did not disturb the bags "in any manner," and procured a search warrant prior to the search or seizure of the narcotics.

** Of course, the Gills contend that even if the warrant was not tainted by the "walk-through," it was invalid because of a lack of probable cause, a lack of specificity and the perjurious nature of the affidavit. These arguments are discussed separately, *infra*.

thing seized afterward and their offer to bribe the officers should have been suppressed as the product of the illegal search. (Gill Br., at 20-21). That argument, however, has no merit, since Powers' check was clearly not a search: he seized nothing, opened nothing, and in fact made no intrusion other than to look into the other rooms of the apartment.* In *United States* v. *Christophe*, 470 F.2d 865 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973), this Court approved a security check much more intensive than that conducted by the police in the present case, stating, 470 F.2d at 869:

> "... the evidence developed at the suppression hearing made it abundantly clear that when the agents first walked through the Pierro house at 2:00 A.M., they were simply securing the premises after arresting Pierro. They were entitled to conduct a cursory examination of the premises to see if anyone else was present who might threaten their safety or destroy evidence." **

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* After observing the bags of marijuana and cocaine, Powers did look into each of the other rooms of the apartment, to see if they were occupied. The observation of the bags from Point "K", however, occurred *before* the inspection of the other rooms. Accordingly, if Powers was justified in proceeding to point "K", from which he saw the bags in plain view at the kitchen entrance, the bags are not subject to suppression simply because Powers *after* finding the bags checked the other rooms of the apartment for occupants. *United States* v. *Antieri*, 491 F.2d 440 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974).

** In *Christophe*, Pierro was a previous narcotics violator, and, earlier on the evening in question, the agents had observed a Cadillac stop in the road opposite Pierro's house while the driver and Pierro carried a number of bundles from the car's trunk into the house and had then seized 39.8 pounds of heroin from the Cadillac after a high-speed chase. Those factors are not present in this case, but their absence does not invalidate Powers' security check. The *Christophe* security check was con-

[Footnote continued on following page]

Powers merely made a 10-15 second walkthrough security check of the apartment (Powers, H. Tr. 171). As Judge Cannella found, Detective Powers merely, "proceeded to walk through the apartment to determine whether anyone else was present . . ." (403 F. Supp. at 300; Powers, H. Tr. 179-80; McQueen, H. Tr. 234, 261). Powers testified that no drawers or cabinets or closets other than those in which a person could conceal himself were opened (H. Tr. 99, 112; see also, McQueen, H. Tr. 263), and Judge Cannella found that there was no search of such areas prior to the execution of the search warrant. 403 F. Supp. at 301.*

In addition to *Christophe*, numerous decisions in other jurisdiction clearly uphold as reasonable such a "quick and cursory" check of an apartment where an arrestee is located. *United States* v. *Turbyfill*, 525 F.2d 57, 59 (8th Cir. 1975); *United States* v. *Bridd.e*, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *Looney*, 481 F.2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973).

While Judge Cannella found that ". . . neither Detective Powers nor Sgt. McQueen had knowledge of any facts which would indicate that there were others in the apartment or that they themselves were in danger," (403 F3. Supp. at 303), and that therefore, "no . . . circum-

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ducted at 2:0 A.M., there was no consent to the agents' presence in the house, and the whole house and garage were apparently checked. Here, by contrast, the security check occurred at approximately 2:30 P.M., after the agents had been invited into the Gills apartment by Mr. Gill, and the check lasted only 10-15 seconds and covered only a very limited area.

* Powers' action was not only reasonable but was required by Police Department regulations. Powers testified that police department procedure required the officers to check the apartment for other peop' who "might injure you" or who might be involved in the o..nse at hand (H. Tr. 131, 133, 136-37, 141, 169, 171-72, 220-21).

stances were present here" to justify a security check of the premises, (403 F. Supp. at 302-03), this was not a case where such precise knowledge was required and a requirement of such actual knowledge would needlessly endanger law enforcement personnel.* Judge Cannella relied on *Chimel* v. *California* 395 U.S. 752 (1969), and *United States* v. *Melville*, 309 F. Supp. 829 (S.D.N.Y. 1970), in his holding. Both of those cases, however, dealt with full-blown, intensive warrantless searches involving the opening of drawers and the examination of papers, "a general rummaging of the apartment," *United States* v. *Titus*, 445 F.2d 577, 579 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971), of a sort which simply did not occur here. Thus, while stricter limitations are appropriate for the intensive and detailed searches in *Chimel* and *Melville*, the limited security check conducted here was not an "unreasonable search" violative of the Fourth Amendment.

2. The bribe offer.

Next, the Gills contend that since their offer of a bribe to the officers was "the product of" Powers' security check, Judge Cannella erred in finding that the bribe offer was not tainted by the security check, 403 F. Supp. at 303-04 and that:

> "The tender of money to Det. Powers by Carmen Gill, which the detective interpreted as a bribe, was voluntary and spontaneous and not the result

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* Absent a security check of the premises, any confederates of the Gills who might have been in the other rooms would of course have been able, before the police could obtain a search warrant, to destroy or alter any evidence that might be on the premises, to flee or to attack the police to free the Gills.

> of any physical or psychological coercion. The officers in no way elicited the statement or hand motions which constituted what Det. Powers characterized as a bribe offer." 403 F. Supp. at 304.*

The Gills do not seriously contend that these findings were clearly erroneous. Nor could they, for Judge Cannella's finding that the bribe was independent and not the product of the security check was plainly correct.

The Supreme Court has recently discussed the connection between an illegal search and a confession that follows hard on its heels, and concluded:

> "No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test."

Brown v. *Illinois*, 422 U.S. 590, 603 (1975). We submit that the tests that might apply to a *confession* that is induced by a search are simply inapplicable to a

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* The Gills, at page 28 of their brief, claim that Judge Cannella "misconstrued the governing criteria" and tested the admissibility of the bribe offer under the Fifth Amendment but not the Fourth. In fact, however, Judge Cannella clearly considered the bribe offer under Fourth Amendment taint standards as well as under Fifth Amendment voluntariness standards, finding that the bribe offer was not tainted by the security check and thus constituted independent probable cause information in support of the search warrant. 403 F. Supp. at 303-04. In this regard, it must be noted that counsel below for defendants did not object to Judge Cannella either that he had failed to consider the bribe offer in the context of the Fourth Amendment or that he had overlooked any issues presented on the suppression motion. Thus, the argument which the Gills now make for the first time here was waived. *United States* v. *Rollins*, *supra*, 522 F.2d at 165; *United States* v. *Sisca*, 503 F.2d 1337, 1346-49 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

bribe made by a person who is the object of the search, for the fundamental reason that the policies behind the Fourth Amendment exclusionary rule have absolutely no bearing. An agent who follows a search with an interrogation that yields an incriminating statement is plainly engaged in a single quest—that is, to obtain evidence against the suspect—and the problem of limiting the sought-after fruits of the illegality obviously requires strict judicial supervision. See *United States* v. *Karathanos*, 531 F.2d 26, 35 (2d Cir. 1976). In this case, Judge Cannella properly found that the initial security check was not intended to serve, and did not serve, as an "inducement" for the bribe. This is quite obviously accurate, not only in the sense that the officers (who immediately telephoned their supervisors) did not intend to elicit a bribe, but also that a bribe is a classic example of a "product of a free will," see *Brown* v. *Illinois*, *supra*, that separates a purported illegality from the ultimate evidence.*

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* The particular nature of a bribe offer, and its difference from an ordinary admission or other reaction to an arrest, is reflected in the analagous line of decisions that a bribery prosecution may be instituted and the bribe offer be admitted into evidence even where the bribe is offered in the face of an illegal arrest or failure to give *Miranda* warnings. *United States* v. *Gentile*, 525 F.2d 252, 259 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3545 (U.S. March 29, 1976); *United States* v *Soles*, 482 F.2d 105, 108 n.4 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973); *Vinyard* v. *United States*, 335 F.2d 176, 181 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964); *United States* v. *Perdiz*, 256 F. Supp. 805 (S.D.N.Y. 1966). See also *United States* v. *Mandujano*, — U.S. —, 44 U.S.L.W. 4629 (May 19, 1976) (perjury in Grand Jury without full set of warnings admissible); *United States* v. *Troop*, 235 F.2d 123 (7th Cir. 1956). *People* v. *Cantor*, 36 N.Y. 2d 106, 324 N.E. 2d 872 (1975), relied on by the Gills here, did not involve a bribe offer. In *Cantor*, when the police cut off his car at night and three officers, unidentified as such, came at him from different sides, his taking of a pistol from his pocket was, in contrast to the bribe offer here, a justified reaction to and "a direct consequence of the illegal nature of the stop." *Id.* at 114. Thus, contrary to the Gills' contention, *Cantor* is not in conflict with the Federal law which the court there sought to apply.

In addition, suppression of a bribe offer would not in any way further the deterrent purpose of the exclusionary rule. In *Brown* v. *Illinois, supra*, 422 U.S. at 599-600, the Supreme Court reaffirmed that:

> "The [exclusionary] rule is calculated to prevent not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." (Citation omitted.).

See also *Stone* v. *Powell*, — U.S. —, 44 U.S.L.W. 5313 (July 6, 1976). Thus, Judge Cannella properly reasoned, 403 F. Supp. at 304:

> "If the purpose of the *Miranda* decision, 'to prevent abusive police interrogation of persons not aware of their right to remain silent,' does not extend to the use of a bribe offer in a later prosecution for that crime, ... this Court can see no reason for extending it to preclude the use of a bribe offer in a collateral proceeding, such as one for the issuance of a search warrant." (Citations omitted.).

This reasoning is, of course, equally applicable to the deterrent purpose of the Fourth, as well as the Fifth, Amendment, see *Brown* v. *Illinois, supra*.

Finally, even if this Court should determine that there might be some form of cause and effect relationship between the arrest and security check and the subsequent bribe offer, there is no evidence that the bribe offer related to the bags of cocaine and marijuana found in the kitchen rather than to the marijuana butts and money discovered prior to the arrest or generally to the fact that the Gills were being taken into custody. Indeed, the record is clear that by their offer the Gills were seeking to be allowed to go and not be taken into custody at all. (Powers, H. Tr. 102). Accordingly, the Government sub-

mits that on this basis as well the bribe offer was not "the product of" the security check.

3. The search warrant.

The Gills contend that the search warrant for their apartment also was tainted by Powers' allegedly unlawful "search." However, nothing was seized until after the warrant had been obtained,* and, as Judge Cannella found, 403 F. Supp. at 303, there was a sufficient showing of probable cause derived from sources independent of the allegedly improper security check to sustain the warrant in any event. *United States* v. *Koonce*, 485 F.2d 374 (8th Cir. 1973). See also, *Howell* v. *Cupp*, 427 F.2d 36 (9th Cir. 1970); *United States* v. *Sterling*, 369 F.2d 799 (3d Cir. 1966).**

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* The testimony of the officers that they did not seize the bags of marijuana and cocaine when they were first observed by Powers from the hallway, but waited until the search warrant was obtained, is uncontroverted (Powers, Tr. 112-15).

** As Judge Weinfeld stated in *United States* v. *Epstein*, 240 F. Supp. 80, 82 (S.D.N.Y. 1965):

> "There is authority, and none to the contrary, that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds—considered alone—are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant."

Thus, Judge Cannella found, 403 F. Supp. at 303-04:

> ". . . the affidavit, without consideration of the tainted evidence, contained ample ground for issuance of the search warrant. The information which came to Det. Powers' attention in the lawful performance of his duties, namely, the quantity of 'marijuana' and "sum of money" observed on the table coupled with the bribe offered to the officers not to make the arrest, provided Justice Roberts with a substantial basis for the conclusion that other contraband was probably present in the apartment."

While the Gills contend that the facts in the affidavit other than the observation of the narcotics did not amount to probable cause to issue the search warrant, Judge Cannella's conclusion to the contrary is unquestionably correct.* The unquestioned facts in the affidavit indicated to the reviewing judge that the Gills were arrested in possession of a small quantity of narcotics and subsequently offered the agents money in order to induce the agents not to make the arrest. When viewed in a common sense and realistic fashion, as they must be, see *United States* v. *Ventresca*, 380 U.S. 102 (1965); *United States* v. *Lewis*, 392 F.2d 377, 379 (2d Cir.), *cert. denied*, 393 U.S. 891 (1968); *United States* v. *Manfredi*, 488 F.2d 588, 599 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), these facts alone could only have indicated to a "neutral and detached magistrate" that the Gills had something to hide and that there was either narcotics or evidence of it in the apartment. As Justice Frankfurter noted in *Jones* v. *United States*, 362 U.S. 257, 271 (1960), "The Commissioner need not have been convinced of the presence of narcotics in the apartment. . . . But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient." See also, *United States* v. *Burke*, 517 F.2d 377, 381 (2d Cir. 1975). In particular, this Court has on several occasions noted that when police officers have sought and procured a search warrant, a reviewing court will not lightly second-guess an initial determination of probable cause. *United States* v. *Ramirez*, 279 F.2d 712, 716 (2d Cir.), *cert.*

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* As this Court has noted, an appellate court will give great weight to a finding of probable cause by the trial judge, who, of course, has the closest view of the facts. *United States* v. *Canestri*, 518 F.2d 269 (2d Cir. 1975). In this instance, the Gills ask this Court to overturn the finding not only of the state court judge who initially viewed the affidavit—although admittedly with the fruits of the walk-through before him—but also that of Judge Cannella.

denied, 364 U.S. 850 (1960); *United States* v. *Freeman*, 358 F.2d 459, 462 (2d Cir.), *cert. denied*, 385 U.S. 882 (1962). "One of the best ways to foster increased use of warrants is to give law enforcement officials the assurance that when a warrant is obtained in a close case, its validity will be upheld." *United States* v. *Lewis*, *supra*, 392 F.2d at 379; see also *United States* v. *Desist*, 384 F.2d 889, 897 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969). Only by looking at the affidavit with inappropriate "microscopic intensity," *United States* v. *Pond*, 523 F.2d 210, 214 (2d Cir. 1975), *cert. denied*, — U.S. — (1976), even excluding the observation of the narcotics, could any reviewing court conclude other than that the officers had probable cause to search the apartment.*

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* The Gills also contend that the affidavit in support of the warrant was "perjurious" or at least contained a material misstatement. For this they rely solely on the statement in the affidavit that the security check was conducted "during" the bribe offer when in fact it and the discovery of the bag of marijuana and cocaine by Powers preceded the bribe. However, Judge Cannella correctly concluded: "The timing of the bribe offer herein has no relevance to the existence of probable cause to search." Moreover, while the Gills contend that the misstatement was both intentional and material, Judge Cannella's conclusion that the affidavit misstatement "was neither knowingly nor recklessly made", 403 F. Supp. at 303-04, was plainly correct.

As the Supreme Court has noted, search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States* v. *Ventresca*, *supra*, 380 U.S. at 108; see also *United States* v. *Karaihanos*, *supra*, 531 F.2d at 36 (Van Graafeiland, *J.*, dissenting). This consideration is particularly apt in this case, since the attesting officer knew that while he was procuring the warrant his brother officers remained in the Gills' apartment and they and the integrity of the evidence were at risk. Particularly in view of the insignificance of the misstatement—which did not, it is conceded, fabricate any fact, but merely restated the uncontroverted facts in an incorrect order—it is impossible to conceive that the attesting officer deliberately attempted to create a false impression. From the minuscule nature of the misstatement it also follows that there was

[Footnote continued on following page]

Finally, the Gills contend that the search warrant here improperly authorized a general search. (Brief at 41-46). This contention is also meritless. The search warrant in question here was presented annexed to Detective Powers' affidavit to a New York State Supreme Court judge (361a).* That affidavit asked "that the Court issue a warrant and order of seizure in the form annexed authorizing the seizure of two shopping bags containing alledged (sic) marijuana, one shopping bag containing alledged (sic) heroin or cocaine and any other *contraband* which is, or may be secreted in apartment 3D in premises 580 Amsterdam Avenue, New York County." (361a) (emphasis added). The search warrant authorized a limited search of the apartment for "2 shopping bags of marijuana & 1 bag containing heroin or cocaine." The form language then added ". . . the means of committing a crime, or offense, and the means of preventing a crime or offense from being discovered . . . ." (362a).

The Gills' contention that the warrant amounted to a "general warrant" in violation of the Fourth Amend-

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no showing of an "imposition" on the magistrate. See *United States* v. *Steinberg*, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3659 (May 16, 1976). This Court has held on numerous occasions that only when an affidavit cotnains a misstatement so significant that a magistrate would not have issued the warrant but for the misstatement will the warrant be deemed invalid. *United States* v. *Pond*, 523 F.2d 210, 213-14 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *LaVecchia*, 513 F.2d 1210, 1215 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. (....., 1976); see also *United States* v. *Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. (...., 1976); *United States* v. *Faruolo*, 506 F.2d 490, 493 (2d Cir. 1974); *United States* v. *Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972). See generally, Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825 (1971). The misstatement, which, as the District Court found, was at most "negligent," see *United States* v. *Pond*, *supra*, simply did not rise to this standard.

* Citations to numerals followed by "a" refer to pages in the appellant's Joint Appendix.

ment relies solely on a strained and unrealistic reading of certain portions of the warrant torn from the context of the application. The application particularly noted that it sought only the narcotics that the officers had reasonable cause to believe existed in the aparment and also other "contraband" that might reasonably be thought to be there. The warrant, which was drafted in the first instance by the officers, as well as the affidavit, repeated the identification of the particular narcotics that had been seen and also called for seizure of "the means of committing a crime, or offense, and the means of preventing a crime or offense from being discovered." In the context of the application, this last language simply could not have been intended or understood to authorize the agents to search and seize *anything* in the apartment that might be illegal. Quite clearly, the agents were authorized only to seize narcotics contraband—and they understood themselves to be so limited.* Indeed, in the context of this case there was

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* Judge Cannella found, 403 F. Supp. at 301 n.8, and the Gills do not dispute, that the following items were seized:

1. $71,617.00 U.S. Currency
2. 19 Plastic bags alleged Marijuana
3. 5 Plastic bags alleged cocaine
4. 1 Zephyr Scale
5. 2 Strainers with residue
6. 3 Rolls plastic tape
7. 8 Boxes plastic bags
9. 3 Partially smoked alleged marijuana cigarettes
10. 2 Passports, Columbia S.A.
11. 1 Sealed papers misc. papers
12. 1 Sanyo Electronic Calculator, Serial # 86002934
13. 4 Safe Deposit keys.

This Court has noted that an otherwise unspecific direction in a warrant will not render the warrant void when the papers show the agents "clearly knew" the intended reference. *United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975) (specificity of description of place to be searched).

simply no more precise manner to describe the intended objects of the search than "contraband."

> "When circumstances make an exact description of instrumentalities, [sic] a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking.'

James v. *United States*, 416 F.2d 467, 473 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970), cited with approval in *United States* v. *Scharfman*, 448 F.2d 1352, 1355 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). In this case, the reference to narcotics contraband as the "generic class of items" the officer was seeking was prefectly precise and, particularly under the circumstances in which the warrant was sought and in view of the actual scope of the search, cannot and should not be read in the hypertechnical manner advocated by the Gills.

4. The reasonableness of the search.

Finally, it should be noted that the agents in this case at all times acted with the highest degree of professional conduct and with near-punctilious respect for the Fourth Amendment and proper arrest and seizure procedures. Their reason for approaching the Gill apartment, their entry into the apartment, and their arrest of the Gills following the discovery of the marijuana "roaches" are not seriously contested on appeal and in any event, were entirely proper. The following security check of the apartment was similarly a restrained and proper reaction to the situation faced by the officers, and quite inadvertently led to the discovery of large amounts of narcotics in the apartment. Even though the police officers could have seized those narcotics forthwith, they instead followed the "preferred practice" of procuring a search warrant from a state judge, which

warrant they properly executed. The utter good faith attempt by the officers to comport with regular procedures is apparent. Where probable cause, rather than guilt or innocence, is at issue, the question is whether the agents acted "reasonably on the basis of all the facts at hand." *United States* v. *Tucker*, 380 F.2d 206, 212 (2d Cir. 1967). See also *South Dakota* v. *Opperman*, — U.S. —, 44 U.S.L.W. 5294, 5296 (July 6, 1976). The Gills' attempts to portray the seizure as a massive violation of the Fourth Amendment relies entirely on hypercritical, hindsight analysis of those procedures that neither reveal true violations of the Fourth Amendment nor aid in the process of deterring such violations in the future. See also *United States* v. *Artieri*, *supra*, 491 F.2d at 446-47.

POINT III

The issue of extensive listening on the wiretaps to non-subject conversations was not properly raised by any appellant below.

The appellants jointly claim that the wiretaps involved in this case should have been invalidated and excluded from evidence because there was extensive listening to conversations between persons who were not the subject of the taps at a time when the identity of the speakers was known and wiretap orders including their names could have been obtained. This claim was not properly raised below by any appellant. A short review of the wiretap motions made below and the Government's response to them will demonstrate that this is clearly the case. It thus follows that Judge Cannella quite properly did not hold a hearing to test

the merits of appellants' argument, and each of their claims on appeal should accordingly be denied.

Appellants Velez and Gomez made no motions at all relating to the wiretap evidence.* Appellants Sarmiento and Librado Gill moved by affidavit of counsel to suppress the wiretaps on the sole basis that the warrants authorizing the wiretaps were not based on affidavits adequately demonstrating that normal investigative techniques had been tried or considered and shown to have failed as required under N.Y. Crim. Pro. Law § 700.20.

Appellant Carmen Gill moved for an order granting suppression of electronic interception evidence.** The sole grounds for this motion was a conclusory affidavit of counsel stating the appellant Carmen Gill believed: 1) that any electronic interceptions of her were illegal and should be suppressed; 2) that such interceptions were made without a warrant; and 3) that any warrant issued as to her was without legal sufficiency and should be suppressed. Absolutely no mention was made in the affidavit of a failure to minimize or to include the names of "others known" at the time of the application.

Appellant Jorge Gonzalez requested in his affidavit of June 6, 1975, that a "hearing be held on the admissibility of the wiretap evidence in a trial and to determine whether the wiretaps were made in accordance with the rules of this Circuit". This constituted his

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* Neither did defendants Arco and Beatrice Gonzalez, who were tried below *in absentia*, and who are not parties to this appeal.

** Appellant Carmen Gill also moved for a minimization hearing but orally notified the Government on September 17, 1975, that she withdrew that part of her motion and the Court was so informed by affidavit of the Government. (Affidavit of Michael Q. Carey, sworn to September 24, 1975).

entire written attack on the wiretaps. There was no request for a hearing or an order suppressing the wiretap evidence in his notice of motion.* In open court he amplified that the basis for his motion was that the wiretap warrants "were improperly based on circumstantial evidence and did not have sufficient [probable] cause" (Tr. 9/16/75 p. 16).

Appellant Botero moved on both June 5, 1975, and August 4, 1975, in identical terms to suppress all statements and conversations arising out of the wiretap orders on four grounds: 1) that the orders did not specify that normal investigative procedures had been tried and failed; 2) that there was no probable cause to record any of Botero's conversations; 3) that conclusions set forth in the affidavits of police officers in support of the warrants were not reasonably based on the conversations discussed but rather were based on mere speculation as to their meaning; and 4) that the affidavits supporting the warrants were based on the statements of informants the reliability of whom was not proved and who never saw Botero engage in any criminal conduct. Again, the grounds now asserted were never mentioned.

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* On September 16, 1976, the Court was informed specifically that Gonzalez was not requesting a minimization hearing (Tr. 9/16/75, p. 12). In 74 Cr. 939, Gonzalez had moved for an order suppressing all electronic surveillance evidence. The ground for this motion as expressed in an affidavit of March 4, 1975, was that Jorge Gonzalez's name did not appear in the title of eavesdropping warrants and that the warrants were defective for not naming him. Judge Pollack denied this motion on April 18, 1975, in one sentence finding Gonzalez' papers insufficient to show a basis for suppression. The motion was not renewed in S 75 Cr. 429.

Appellant Parra made no motion as to the wiretaps but asked to be joined in the motions of all other defendants that had application to him.*

Appellant Roldan moved on June 9, 1975, for an order suppressing all telephone recordings of defendant Ruben Dario Roldan in the possession of the Government. Counsel's affidavit was silent on the issue of wiretaps except to repeat the request that they be suppressed. No grounds were specified for suppression of the wiretaps. In fact there was not even an allegation that the wiretaps violated the law. Roldan filed a memorandum of law that did not address itself to the wiretaps in any manner except insofar as it contained a caption, stating "Defendant Roldan relies upon the *briefs* of other counsel with regard to the suppression of the wiretap recordings." ** (Emphasis added).

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* In 74 Cr. 494, Parra had moved on February 3, 1975, for suppression of all unconstitutionally seized evidence. He stated that at the time he knew of no such seizure, but asked in the event he discovered such seized evidence he be given one week to move to suppress it. No such motion was ever made.

** There were no other briefs. Defendant Robinson, who is not an appellant, moved, without affidavit or memorandum of law, to suppress the wiretaps on a number of conclusory grounds including: 1) normal investigative techniques had not failed or proved to be too dangerous; 2) improper minimization of communications that were not subject to interception by the authorizing warrants or 18 U.S.C. § 2518; 3) failure of the United States Attorney to seek federal warrants authorizing the wiretaps; 4) the eavesdropping warrants were unconstitutional in that they authorized a general and continuous search, vested too much discretion in the executing officers, they permitted the executing officers not to minimize their interceptions and "were insufficient on their face"; and 5) there was insufficient probable cause for their issuance. Since he never stated "sufficient facts which, if proven, would have required the granting of the relief requested by appellant." *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969); see also *United States* v. *Grant*, 282 F.2d 165, 179 (2d Cir. 1960), this was properly denied.

The Government's reply to these motions pointed out: 1) that defendants had failed to submit memoranda of law on the issue of wiretaps to the District Court; 2) that most of the defendants' affidavits were conclusory; 3) that defendants Botero, Robinson and Parra lacked standing to attack the introduction of wiretap evidence; 4) that defendant Roldan's motions were insufficiently made and that the Government would respond if Roldan submitted papers setting forth the grounds for his motion; and 5) that, as to the only substantive issue arguably raised by a defendant with standing, the affidavits in support of the wiretap were sufficient to demonstrate that normal investigative techniques had been tried and failed or would have been too dangerous to employ.

Judge Cannella denied all the above motions to suppress wiretaps and separately denied Robinson's and Botero's motion for a minimization hearing (Tr. 22-23).*

From this summary it is abundantly clear that each appellant failed properly to raise the issue they now seek as a pure afterthought to bring before the Court. As Velez and Gomez made no motions whatsoever with respect to the wiretaps their claim is clearly waived. In the context of this case, all other defendants' motions were properly denied by Judge Cannella on the basis that no memorandum of law accompanied the motions of any of the appealing defendants on the wiretap issue. Rule

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* In fact, as shown above Botero made no such motion for a hearing, although it is assumed for purposes of this brief that he did.

9(b), General Rules for the United States District Courts for the Southern and Eastern Districts of New York.*

Moreover, even if each appellant's failure to file a memorandum of law is ignored, the issue raised on this appeal was not raised by a proper party below. The grounds asserted in the motions of Librado Gill and Sarmiento for the invalidity of the wiretaps clearly have no relation to the issue raised on this appeal. Thus they have waived their right to raise the issue of interception of non-subject conversations, as this Court has explicitly held in *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3472 (Feb. 23, 1976); *United States* v. *Sisca*, 503 F.2d 1337, 1346-9 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

The only claims raised below that remotely resemble the claim on this appeal are those that requested a minimization hearing.** However, Jorge Gonzalez expressly negated any intention to make a minimization

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* Rule 9(b) provides "Upon any motion the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion divided, under appropriate headings, into as many parts as there are points to be determined. . . . Failure to comply may be deemed sufficient cause for the denial of the motion. . . ." In the context of an exceedingly complicated issue arising in a large and complicated case, the District Court's right to be properly informed was not a technicality. This is particularly true since no appellant subsequently tried to cure the deficiencies of the original motions, although there was time to do so.

** Appellants joint brief never once characterizes its claim before this court as a failure to minimize. The Government is aware, of course, that had a minimization motion been properly raised the burden would initially have been on the Government to show proper minimization. *United States* v. *Rizzo*, 491 F.2d 215 (2d Cir. 1974), *cert. denied*, 416 U.S. 990 (1974).

motion. Carmen Gill similarly withdrew her motion on this point.* Roldan's papers are totally conclusory and give no indication whatsoever as to why he believed the wiretaps should be suppressed. Even if Roldan were permitted to incorporate the briefs of other counsel by means of a heading in his brief, no other brief argued minimization or any claim resembling that raised on this appeal for the simple reason that no other brief was submitted to the District Court. Roldan at no time responded to the Government's specific invitation to clarify the bases for his motion attacking the wiretaps. Therefore, he too waived the right to raise the issue on appeal.

Appellant Botero and co-defendants Gaston Robinson were the only defendants who made motions based on minimization that reached the stage where rulings were required by the Court. However, they, as well as Parra: 1) were not the subject of any wiretap; 2) did not possess any phone upon which a wiretap had been placed; and 3) were not a party to any of the conversations recorded. Accordingly, they lacked standing to attack the wiretap in any manner.** See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 176 (1969); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States* v. *Bynum*, 513 F.2d 533, 534-5 (2d Cir. 1975); *United States* v. *Garcilaso de la Vega*, 489 F.2d 761, 763 (2d Cir. 1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974);

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* Had they not withdrawn their minimization claims, Judge Cannella could have properly denied their motions on the ground that their papers were entirely conclusory.

** See affidavit of Michael Q. Carey, sworn to September 24, 1975, and Tr. 3115. Had appellant Gomez made any motion seeking to suppress the wiretaps, it too would have been properly denied for lack of standing.

United States v. *Houltin*, 525 F.2d 943, 946 (5th Cir. 1976); *cf.* 18 U.S.C. §§ 2518(10)(a) and 2510(11).*

In sum, it is abundantly clear that despite the fact that at least as early as May 1975, the wiretap recordings were available to all counsel for listening (Tr. 5/12/75, p. 11), and the Government had made available to each counsel a set of the wiretaps orders and underlying affidavits,** the issue that appellants now argue to this Court was not even hinted at, much less properly raised in the Court below by a defendant with standing. Accordingly, the appellants have utterly failed to raise or preserve this issue for this Court. *United States* v. *Friedland*, 391 F.2d 378, 381 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).***

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* Assuming any defendant other than Botero or Robinson, particularly one with standing, considered himself to have made a motion relating to a minimization hearing or a closely related claim, he failed to inform the District Court of this at the time the Court denied Botero's and Robinson's minimization motions. Therefore, it is again clear that no defendant with standing intended to raise any minimization type issue or the issues now raised on appeal. In any event, the failure to alert the Court of any such intention at the time it made its ruling on miminization constitutes a waiver of the claim.

** Indeed, Jorge Gonzalez' attorney had seen the wiretap orders and affidavits prior to April 17, 1975 and Roldan's attorney was given the opportunity to see them that day. (Tr. 4/17/75, p. 11).

*** We note that in *United States* v. *Mejias*, 76 Cr. 164 (S.D.N.Y.), prior to the trial held with respect to other co-conspirators, the minimization issue with respect to these very same wiretaps was decided on the merits. In that case, counsel for Roldan in his capacity as counsel on behalf of Estella Navas, in contrast to the present case, specifically alleged a failure to minimize in his motion papers. Judge Carter, in any event, ruled that the wiretaps had been properly minimized. Such testimony as came out of this trial also indicates the wiretaps were properly minimized (GX 9; Tr. 2982, 3012).

POINT IV

Defendants were not deprived of their right to a speedy trial.

Appellants Roldan and Jorge Gonzalez assert that the indictment should have been dismissed by the District Court because the Government failed to notice its readiness for trial within six months of their arrest in violation of the Plan for Achieving Prompt Disposition of Criminal Cases of the United States District Court for the Southern District of New York (hereinafter "Speedy Trial Rules").* In addition, defendant Gonzalez asserts that his Sixth Amendment right to a speedy trial was violated.** We show below that neither claim is meritorious.***

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* Roldan and Jorge Gonzalez were not arrested on superceding indictment S. 75 Cr. 429 until after its filing on April 30, 1975. While neither Roldan nor Jorge Gonzalez has argued why the Government should be charged with filing a Notice of Readiness within six months of their original arrest and not within six months of their arrest on the superseding indictment, for purposes of this argument only, the Government will assume it is so charged, without taking any position on the correct interpretation of the law regarding this point.

** Appellants Parra and Gomez join in those portions of the Roldan and Gonzalez briefs that discuss the Speedy Trial Rules.

In the alternative, appellants ask this Court to remand this case to the District Court for a hearing to determine whether the Government failed to comply with the Speedy Trial Rules.

*** For the Court's convenience, we include the following chronology. While we make no claim that it is exhaustive, it does list those events necessary for an understanding of defendants' speedy trial claims: (1) September 17, 1974—Gonzalez taken into State custody; (2) October 4, 1974—Indictment 74 Cr. 939 filed (later superseded by Indictment S75 Cr. 429); Roldan arrested; (3) October 31, 1974—Gonzalez arraigned; (4) November 22, 1974—Roldan moves for a speedy trial, a severance, and for a reduction

[Footnote continued on following page]

of bail; (5) November 29, 1974—Roldan's motions denied; (6) December 27, 1974—Government mails to Roldan one copy DEA Personal History Report, Defendant's Statement before arraignment, and one copy of four wiretap conversations; (7) January 2, 1975—Gonzalez asks the Court for more time in which to make motions; (8) January 3, 1975—Gonzalez moves for release pursuant to Rule 3 of the Speedy Trial Rules; (9) January 13, 1975—Roldan moves for release pursuant to Rule 3 of the Speedy Trial Rules; (10) January 20, 1975—Judge Tyler denies speedy trial motions (Rule 3) and extends Government's time to file notice of readiness to February 18, 1975; Gonzalez asks for more time for discovery motions; Gonzalez told to pursue discovery informally (1/20/75 Tr. 22); (11) February 18, 1975—Government files notice of readiness in Indictment 74 Cr. 939; (12) March 4, 1975—Gonzalez moves to suppress evidence, for a severance and for release on bail; (13) April 4, 1975—Roldan moves to strike notice of readiness and to dismiss for failure to comply with the six month rule, joined by Gonzalez on April 18, 1975; (14)—Judge Harold R. Tyler resigns from the bench and indictment 74 Cr. 939 is assigned to Judge Milton Pollack; (15) April 17, 1975—Roldan's motions to strike notice of readiness and to dismiss denied; Court orders Government to furnish bill of particulars and sets trial date of April 28, 1975; Roldan concedes he is not ready for Trial on April 28 and that his discovery requests are pending; Tirelli notes that his motions are still pending (4/17/15 Tr. at 6, 9, 30); (16) April 18, 1975—Gonzalez listens to tapes; (17) April 21, 1975—Gonzalez' motions to suppress, for a severance and for bail denied; (18) April 29, 1975—Roldan listens to wiretap conversations at United States Attorney's Office; (19) April 30, 1975—superseding indictment S 75 Cr. 429 filed; (20) May 1, 1975—transcripts of tapes made available to defendants and defendants informed that they may listen to and copy all tapes; (21) May 5, 1975—Government files notice of readiness on superseding indictment; (22) May 6, 1975—Roldan and Gonzalez informed by letter dated May 6, 1975 that copies of wiretap applications and orders are available; (23) May 9, 1975—Roldan receives one set of conversations and one set of wiretap affidavits and warrants; (24) May 12, 1975—Gonzalez receives one set of transcripts and one set of wiretap applications and affidavits; (25) May 14, 1975—Roldan and Gonzalez informed by letter dated May 14, 1975 that copies of chronological files are available; (26) May 21, 1975—Gonzalez receives one copy of

[Footnote continued on following page]

A. Defendants' claims under the speedy trial rules.

Defendants Gonzalez and Roldan, on January 3 and 13, 1975, respectively, moved to be released from custody pursuant to Rule 3 of the Speedy Trial Rules.* In re-

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wiretap logs and one copy of post arrest statements; (27) May 22, 1975—(Tr. 12, 17) Court sets trial date of September 16, 1975; (28) May 29, 1975—Roldan and Gonzalez receive one set of original logs and Roldan receives one set of synopsis logs; (29) June 6, 1975—Gonzalez makes "omnibus motion"; (30) June 9, 1975—Roldan moves for a speedy trial under six month rule; (31) August 12, 1975—Gonzalez moves to dismiss for want of prosecution; (32) August 15, 1975—Roldan and Gonzalez informed by letter dated August 15, 1975, that copies of additional wiretap conversation transcripts are available, 130 cassette recordings are available for inspection and copying, the original wiretap logs are available for inspection, laboratory reports and FBI fingerprint records are available for copying, and copies of defendant's documents and statements are available; (33) August 20, 1975—Government mails to Gonzalez FBI fingerprint record, DEA Personal History Report and Forms 306 dated October 31, 1974 and May 29, 1975; (34) August 21, 1975—Government mails to Roldan copy of FBI fingerprint record and defendants statement dated April 18, 1975; (35) August 21, 1975—Government mails to Gonzalez copies of copy of application for eavesdropping warrant dated January 2, 1974, and application to renew dated June 6, 1975; (36) September 8, 1975—proceedings stayed by Court of Appeals, trial adjourned to October 1, 1975; (37) September 10, 1975—Gonzalez receives one copy of lab reports and transcripts of conversations; (38) October 2, 1975—Government mails to Roldan one copy of FBI laboratory report regarding codes; (37) October 20, 1975—Roldan informed that consent tapes are available for inspection and copying; (40) October 20, 1975—trial commences.

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* Rule 3, in pertinent part, provided:

> "In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time . . . the defendant shall be released . . . unless there is a showing of exceptional circumstances justifying the continued detention of the defendant. . . ."

[Footnote continued on following page]

sponse to those motions, the Government asked the Court to allow it until February 18, 1975, to file its notice of readiness and submitted in support of that application the affidavit of Michael Q. Carey, sworn to on January 20, 1975, in which the Government's continuing efforts to prepare the case and the difficulties being encountered were set forth. On January 20, 1975, the Court granted the Government's application, specifically finding that the Government was not being dilatory and that the additional time was justified by exceptional circumstances. (1/20/75, Tr. at 14-17).

On February 18, 1975, the Government filed its notice of readiness. Defendants, relying principally on *United States* v. *Pollak*, 474 F.2d 828 (2d Cir. 1973) and the Government's "failure" to provide transcripts of taped conversations until May 1, 1975, sought below, commencing April 7, 1975, and seek now on appeal, to have the indictment dismissed for failure to comply with Rule 4 (the "six-month rule") of the Speedy Trial Rules then in effect.* They argue that, despite the notice of readi-

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Rule 1(a) of the Speedy Trial Rules defined custody as "custody on the federal charge". Gonzalez was arrested by New York City authorities on September 17, 1974 and was not taken into federal custody until October 31, 1974. As such, his motion, dated January 3, 1975 was premature. For purposes of this appeal, however, we will assume, as Judge Tyler did below (Hearing Transcript, January 20, 1975, p. 9), that Gonzalez was in custody more than ninety days when his motion was heard on January 20, 1975.

Rule 3, and the other Speedy Trial Rules in effect throughout the proceedings below, were superseded by speedy trial rules that became effective on September 29, 1975.

* Rule 4 of the Speedy Trial Rules provided, in pertinent part:

> "In all cases the government must be ready for trial within six months from the date of arrest. . . . If the government is not ready for trial within such

[Footnote continued on following page]

ness, the Government was not, in fact, ready for trial on February 18, 1975.

In asserting that the Government was not ready on February 18, 1975, defendants rely solely on the fact that English translations of the transcripts of the taped conversations were not furnished to defendants until May 1, 1975. "Readiness," however, is not to be, and cannot be, judged by the defendants' conception of the manner in which the Government should present its evidence.* Nor does the six-month "readiness" rule require the Government to be as fully prepared when it files its notice of readiness as it will, or can, ever be. Rather, the rule merely requires the Government to be ready to proceed. *Cf. United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973). In this case, that standard was met. As Judge Pollack noted below, the Government could have proceeded to trial without the use of transcripts were it ordered to do so. (4/17/75 Tr. at 18-20). That Judge Pollack was correct is evident from the record. While the trial of this case commenced on October 20,

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time . . . the defendant may move . . . for dismissal of the indictment. . . If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice. . . ."

At no time after the Government filed its first notice of readiness did defendants renew their motions for release pursuant to Rule 3.

* We note that the Government was under no obligation to prepare translations of its evidence for the benefit of the defendants.

1975, neither tapes nor transcripts were used until November 20, 1975. (Tr. 3131).*

Thus, defendants have presented no valid reason for probing behind the February 18, 1975, notice of readiness and their alternative request for a hearing to do so should be denied. Moreover, even assuming, *arguendo*, that that notice was ineffective because the Government was required to provide the translated transcripts, it became effective on May 1, 1975, when the Government fulfilled that obligation. See, *United States* v. *Strayhorn*, 471 F.2d 661 (2d Cir. 1972); *United States* v. *Gonzalez*, 389 F. Supp. 471 (E.D.N.Y. 1975).

In any event, readiness by May 1, 1975, when the translated transcripts were provided, or by May 5, 1975, when the Government noticed its readiness as to Indictment S. 75 Cr. 429,** satisfied the Government's obligations under the Speedy Trial Rules since:

> "In computing the time within which the Government should be ready for trial under Rules 3 and 4, the following periods should be excluded:
>
> (a) The period of delay while proceedings concerning the defendant are pending, including . . . pretrial motions . . . and the period during which such matters are sub judicie.
>
> * * * * *
>
> (e) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run. . . ." Rule 5, Speedy Trial Rules.

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* Nor is *United States* v. *Pollak*, *supra*, apposite to this point. In that case, this Court suggested that in light of the Government's failure to comply with an outstanding discovery order it might not have been actually ready when it filed its notice of readiness. There was no such order in this case.

** Neither Roldan nor Gonzalez challenges the veracity or any other aspect of the Government's Notice of Readiness of May 5, 1975.

As noted above, at p. 50, n.***, defendant Gonzalez made a motion to dismiss and to reduce bail which was pending from January 3, 1975 to January 30, 1975, a motion to suppress, a motion to sever, which was pending from March 3, 1975 to April 21, 1975, and a motion to strike the Government's Notice of Readiness (filed February 18, 1975) which was pending from April 8, 1975 to April 17, 1975. In addition, Gonzalez engaged in informal discovery from January 20, 1975 to April 17, [illegible] before he obtained a Court order. Thus, excluding the periods of pendency which overlap, Gonzalez had motions pending for a total of at least fifteen weeks prior to May 1, 1975. Even if the period of informal discovery were excluded, motions were pending for nine weeks. Thus, if one makes the erroneous but charitable assumption that the six-month period commenced on September 17, 1974, the six-month period from his arrest would not have terminated until March 17, 1975. Adding excluded periods extends the Government's time to file its notice of readiness until July 10, 1975, well beyond May 1, 1975, and the actual filing date of May 5, 1975.

Defendant Roldan's six-month period began on October 4, 1974, and the six-month period from his arrest ended on April 4, 1975. However, as noted above, at p. 50, n.***, Roldan had a motion for speedy trial, severance and bail reduction pending from November 22, 1974 to November 29, 1974; the motion was renewed on January 13, 1975, and was pending until January 20, 1975; and a motion to strike the Government's Notice of Readiness of February 18 was pending from April 4, 1975 to April 17, 1975. Thus, the time excluded for pending motions was alone sufficient to extend Roldan's six-month period to May 1, 1975, when the Government provided the transcripts, the absence of which Roldan

urges as the only ground for finding the earlier notice of readiness a fraud. In addition, Roldan was joined at all times with defendant Gonzalez, whose six-month period did not run until July 10, 1975. Thus, the "reasonable period of delay" which is excluded under Rule 5(e) of the Speedy Trial Rules for that period of time when a defendant is joined with a co-defendant whose time for trial has not run, is more than sufficient to extend the terminus of Roldan's six-month period beyond May 1, 1975 or May 5, 1975. See *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974).

This review of the facts makes it overwhelmingly clear that neither the Government nor the the Court violated the Speedy Trial Rules. Should this Court find otherwise, however, the indictment still should not be dismissed. Rather, the case should be remanded to the District Court for a hearing on whether there was any period of delay occasioned by exceptional circumstances within the meaning of Speedy Trial Rule 5(h). *United States* v. *Scafo*, 470 F.2d 748 (2d Cir. 1972).

B. Gonzalez' Sixth Amendment claim.

Defendant Jorge Gonzalez and the Government agree that the four-point balancing test enunciated in *Barker* v. *Wingo*, 407 U.S. 514 (1972), is controlling with respect to Gonzalez' claim that his Sixth Amendment right to a speedy trial was violated. See also *United States* v. *Borman*, 455 F.2d 44, 46 (2d Cir.), *cert. denied*, 402 U.S. 913 (1971). Application of that test demonstrates the speciousness of Gonzalez' claim.

The first factor to be considered under the *Barker* test is the length of the delay. In this case, the delay between the original indictment and trial was one year and sixteen days. That delay was hardly excessive.

United States v. *Infanti*, 474 F.2d 522 (2d Cir. 1973) (28-month delay from arrest to trial deemed not extraordinary); *United States* v. *Gonzalez*, 389 F. Supp. 471 (E.D.N.Y. 1975) (two-year delay not inordinate). Indeed, in light of the complex nature of the case, we question whether a one-year period from indictment to trial can be considered delay at all.*

The second factor to be considered is the reason for the delay. With respect to this, we note that this was a complex conspiracy case involving multiple defendants; that each of the defendants made numerous motions and had to be considered by the court; and that the trial judge originally assigned to the case resigned from the court while it was pending. Furthermore, at no time after its initial request for a one-month continuance to file its notice of readiness did the Government request an adjournment. *Cf. United States* v. *Infanti*, *supra*, 474 F.2d at 527; *United States* v. *Nathan*, 476 F.2d 456, 461 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

The third factor to be considered is whether defendant asserted his right to a speedy trial. The Government does not dispute that each defendant asserted his right.

The fourth and final factor to be considered is whether the defendant was prejudiced by the delay. Defendants assert that two witnesses who would have exonerated them—Arturo Gonzalez and Ramiro San Cocho—became unavailable during the pendency of the proceedings. However, those witnesses were co-defendants and there was never any showing made that they would

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*"[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker* v. *Wingo*, *supra*, 407 U.S. at 531.

have been willing to waive their Fifth Amendment privilege and testify. Moreover, we note that those witnesses were not made unavailable by illness or death. Rather, they became unavailable because they fled the jurisdiction of the Court and thus were never likely to be available at trial. *Cf. United States* v. *Smalls*, 438 F.2d 711 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971).* Finally, we note that those "witnesses" did not disappear during an extended period of delay. Thus, no defendant has demonstrated any prejudice. See *United States* v. *Alo*, 439 F.2d 751, 755 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971).

Upon a balancing of all of the relevant considerations it is clear that none of the defendants' rights to a speedy trial, whether based upon the Sixth Amendment or upon the local court rules, was violated.

POINT V

The double jeopardy clause did not bar the conviction of Gomez, Parra and Botero for conspiracy; nor at this late date may Botero seek a hearing on the scope of the Government's knowledge at his earlier trial

Botero (Botero Br. at 37), joined by Parra and Gomez (Parra-Gomez Br. at 17), complain that their earlier indictment and conviction for *importation* and *possession* of cocaine should have prevented their subsequent indictment for conspiracy to import and distribute cocaine. Their argument is without any merit.

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* The fact that Arturo Gonzalez and San Cocho fled is, of course, highly probative of whether they would have testified for defendant. Defendant Arturo Gonzalez is appellant Jorge Gonzalez' half-brother.

In June, 1973, Parra and Gomez were arrested on a criminal complaint sworn in the Western District of Texas charging them with possessing a specified amount of cocaine on June 13, 1973, that they allegedly had conspired together to import. They were subsequently indicted only for importation and possession. Almost immediately they pled guilty and were sentenced on August 30, 1973. (See Parra-Gomez Br. at 10).

Parra and Gomez argue that Judge Cannella committed an error in denying their motion to dismiss the indictment on the ground of double jeopardy. They seem to rest their case on the bare claim that the present indictment repeated as an overt act their importation of cocaine in 1973 and because the word conspiracy was used in the Texas complaint, although a conspiracy count was not included in the Texas indictment.

Parra and Gomez do not contend that in 1973 the United States Attorney's office in Texas—or any prosecutor's office—knew or should have known of their role in the vastly larger conspiracy charged in the instant case. Rather, they contend that even absent governmental knowledge of the broader plan, an indictment simply for possession or importation, superseding a complaint charging conspiracy to import the thing possessed, precludes a later, broader conspiracy indictment incorporating that possession. This Court has recently rejected that claim. *See United States* v. *Cala*, 521 F.2d 605, 607 (2d Cir. 1975); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *See also United States* v. *Cioffi*, 487 F.2d 492, 497 n.6 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).*

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* The filing of a complaint against Parra and Gomez charging them with conspiracy is absolutely irrelevant. *See United States* v. *Gogarty*, 533 F.2d 93 (2d Cir. 1976). What is dis-

[Footnote continued on following page]

Appellant in *Cala* was indicted for conspiracy to transfer counterfeit currency, even though he had earlier been tried and acquitted for possession of the *same* currency. Nonetheless, this court rejected the double jeopardy claim.*

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positive is the indictment upon which they were convicted, not the complaint which preceded it. *See Ortega-Alvarez, supra,* 506 F.2d at 458 (conspiracy charge in original indictment that was dismissed before trial does not create double jeopardy).

Indeed, even had Parra and Gomez been charged with conspiracy in the Texas indictment, they have not begun to meet their burden, see *United States* v. *Cala, supra,* 521 F.2d at 608; *United States* v. *Gugliaro,* 501 F.2d 68, 70 (2d Cir. 1974), of showing that that conspiracy and the conspiracy charged in the present indictment are the same. *United States* v. *Bommarito,* 524 F.2d 140, 146 (2d Cir. 1975).

Finally, even if Parra and Gomez had been *acquitted* on the substantive offense, the law is clear that the double jeopardy clause would not bar their subsequent indictment for conspiracy to commit the same act. *Sealfon* v. *United States,* 332 U.S. 575, 577 (1948).

* The Court noted:

> To support a former jeopardy claim, it must be shown that the offenses charged were in law and fact the same. *United States* v. *McCall,* 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied,* 419 U.S. 849 (1974); *United States* v. *Pacelli,* 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973). Unless "the evidence required to support a conviction upon one [indictment] would have been sufficient to warrant a conviction upon the other," the double jeopardy defense must fail, *United States* v. *Cioffi,* 487 F.2d 492, 496 (2d Cir. 1973), *cert. denied,* 416 U.S. 995, 94 S.T. 2410, 40 L.Ed. 2d 774 (1974), quoting, *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1971). Prosecution for multiple statutory violations arising out of a single transaction is permissible, and each violation may be tried separately. *United States* v. *Nathan,* 476 F.2d 456, 459 (2d Cir.), *cert. denied,* 414 U.S. 823, 94 S.Ct. 171, 38 L.Ed. 2d 56 (1973).

United States v. *Cola, supra,* 521 F.2d at 607.

[Footnote continued on following page]

Botero's claim is also without merit. Botero failed to move before trial to dismiss the indictment on the grounds of double jeopardy and must therefore be held to have waived his claim, since it is "based on defects in the institution of the prosecution or in the indictment." F.R.Cr. P. 12(b) (2) (as in effect until November 30, 1975).*

As Judge Cannella observed, here, as in *Cala*, evidence required to support the substantive convictions would not have sustained the later conspiracy conviction since the conspiracy charge "require(s) proof of a 'criminal agreement to merchandise narcotics' (citation omitted), an element wholly irrelevant to the charge to which they were previously convicted." Oct. 9, 1975, Mem. Op. # 43234.

Furthermore, as Judge Cannella noted in his memorandum opinion, these defendants' claims are squarely refuted by this Court's decision in *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974). In that case, Ortega-Alvarez had been previously convicted in another state for a substantive violation of selling narcotics not in their original stamped package. The Court noted that this conviction did not preclude his subsequent indictment and conviction on a conspiracy charge, even though the facts underlying the first conviction were "also a part of the present conspiracy." 506 F.2d at 457. In particular, this Court noted that "a charge of a wide-ranging narcotics conspiracy consisting of numerous transactions is certainly sufficiently distinct from a charge of a substantive violation based on a single sale." See also *United States* v. *Cioffi*, *supra*, 487 F.2d at 497 n. 6.

* Untimeliness and waiver also compel denial of Botero's application, made for the first time on appeal, for an evidentiary hearing as to the Government's knowledge at the time of the first trial of the facts underlying the conspiracy charges against him in the present case. Because the principal factual underpinning to Botero's application is simply the language of indictments 73 Cr. 729 and 74 Cr. 494 and was equally available to Botero before the trial as it is today, his application must be denied. See *United States* v. *Chiarizio*, 525 F.2d 289, 293-94 (2d Cir. 1975).

If, by incorporating by reference Botero's argument as to double jeopardy, Parra and Gomez (Parra-Gomez Br. at 17, Point V) mean also to seek an evidentiary hearing concerning the government's knowledge, their application—like that of Botero—must be denied as untimely.

Even assuming, *arguendo*, that the double jeopardy claims of Botero was preserved, Botero's assertion of error based upon the Government's failure to join his 1974 indictment for conspiracy to his 1973 indictment for distributing cocaine lacks any merit for the same reasons set forth above in response to the claims of Parra and Gomez. See *United States* v. *Cala*, *supra*, 521 F.2d at 607.

In 1973, Botero was charged in a one count, one defendant indictment, 73 Cr. 729, with possession of cocaine with intent to distribute. On August 13, 1973, a not guilty plea was entered and a bench warrant was ordered for his arrest. In or about March 1974, Carmen Caban and Rita Ramos began to cooperate with the Government. As a result of their cooperation, the Government began to learn of the widespread drug trafficking in which Botero engaged and on May 11, 1974, the Government filed Indictment 74 Cr. 494, charging twenty-one defendants with one count of conspiracy to distribute cocaine and one count of distributing cocaine. On May 21, 1974, Botero was arrested on a second bench warrant issued with respect to his failure to appear for trial on indictment 73 Cr. 729. On June 27, 1974, Botero went to trial on the 1973 indictment and he was convicted on July 2, 1974.

Clearly, the two indictments charge different crimes. Not only was the proof of each different, but Botero does not even contend that the Government had proof at the time of his 1974 trial that the acts underlying his 1973 indictment were acts in furtherance of the conspiracy

with which he and twenty-one other defendants were charged in Indictment 74 Cr. 729.*

It follows that since Gomez, Parra and Botero have not previously been tried on the charges of which they are now convicted, their double jeopardy claims are utterly without merit.

POINT VI

Sarmiento's motion for a mistrial based on alleged denial of his right of confrontation was properly denied.

Sarmiento argues that Judge Cannella erred when he denied his motion for a mistrial on the ground that he was denied his right of confrontation in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), when a Government witness said co-defendant Julian Carrion-Arco named Sarmiento in a post-arrest statement. He

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* The appellants' claims that the past and present indictments somehow constituted "piecemeal" prosecution is similarly refuted by this Court's decision in *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). In that case, the defendant Pacelli was charged with narcotics offenses in three separate indictments even though the Government apparently conceded that all the evidence underlying these indictments was available at the time of the first indictment and could have been included in it. While Pacelli raised the argument specifically in terms of a claim of pre-indictment delay, the Court noted in rejecting that conclusion, "the multiplicity of indictments is more attributable to the multiplicity of appellant's criminal acts than to the bad faith of the government." *Id.* This language is, of course, even more applicable to the present case, where the 1973 indictment charged possession of cocaine on one day and the evidence in this case demonstrated his participation in a wide-ranging conspiracy in which he possessed cocaine on an almost daily basis from 1972 through July 1973.

further claims that this "error" was not cured by Judge Cannella's prompt instruction to the jury. (Sarmiento Br. at 41).

Sarmiento's argument fails for at least three reasons. First, he failed to object to the question by his co-counsel on cross-examination at a time when a prompt objection would have precluded the statement. Second, the testimony was neither clearly inculpatory nor particularly important to the Government's case. Third, Judge Cannella gave effective cautionary instructions to the jurors.

On cross-examination by Arco's attorney concerning Arco's post-arrest admissions, Detective Vincent Palazzotto testified that Arco told him Alberto and Bruno Bravo, Bernardo Roldan and "others" were active in the narcotics business. Arco's attorney then inquired who the "others" were and Detective Palazzotto answered "Mono", the alias by which Sarmiento was most often referred to during the trial (Tr. 6706).*

Only moments before, Judge Cannella asked Arco's counsel to reflect on the direction his questions were taking and he responded "Judge, I understand. I am considering the problems of the other defendants." (Tr. 6706). Despite the Court's and defense counsel's highlighting the danger of a *Bruton* problem being posed by co-defense counsel's questions and despite lengthy side bar conferences at which defense counsel were informed that Detective Palazzotto, if asked to do so, would include Sarmiento as one of the individuals Arco had mentioned (Tr. 6641-42), Sarmiento made no objection to co-counsel's question before it was answered (Tr. 6706). After the alleged damage was done, Sarmiento objected and

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* Julian Carrillon-Arco fled after posting cash bail in the amount of $250.000 and he was tried and convicted *in absentia*.

moved for a mistrial. Judge Cannella immediately sustained the objection, ordered the answer stricken and instructed the jury to disregard it. (Tr. 6706). Sarmiento's motion for a mistrial was subsequently denied. (Tr. 6707, 6709, 6710).

Immediately after the lengthy side-bar conference on Sarmiento's motion for a mistrial, Arco's attorney again proceeded to ask broad questions about what Arco said during the interview. Again, Sarmiento's attorney voiced no [illegible] and Judge Cannella had to direct the witness to say he could not answer the question if his answer would involve other defendants (Tr. 6712-6713).

Thus, Sarmiento waived his objection by failing, despite having advance notice of the *Bruton* dangers which his co-counsel was courting, to raise a timely objection to the question, the answer to which is now the foundation of his appeal. *See United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir., 1975); *United States* v. *Rivera*, 513 F.2d 519, 526 (2d Cir.), *cert. denied*, — U.S. — (1975); *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir., 1974); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir., 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). *Cf.*, *United States* v. *Price*, 447 F.2d 23, 27 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971).

Moreover, Sarmiento's appeal must be denied as Judge Cannella acted well within the bounds of his discretion in finding Palazzotto's testimony was not clearly inculpatory and not vitally important to the Government's case. This Court has held on numerous occasions that not every post-arrest statement inculpating another requires a severance or mistrial. *See, United States* v. *Wingate*, 520 F.2d 309 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States* v. *Cassino*, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) (guilt provable without complained

of testimony, which was consistent with innocent meaning as well as inculpatory one). Indeed, in *Bruton* itself, the Supreme Court noted:

> Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instruction to disregard such information.

Bruton v. *United States*, *supra*, 391 U.S. at 135. See also *Frazier* v. *Cupp*, 394 U.S. 731, 735 (1969). In ruling on Sarmiento's motion for a mistrial, Judge Cannella found, *inter alia*: (1) that the evidence was not of vital importance to the Government's case, since there was a great deal of other evidence incriminating Sarmiento; (2) that the testimony was invited by a defense counsel on cross-examination; (3) that the hearsay statement was conclusory and would have been stricken had it been directly testified to by Arco himself; and (4) that the motion was made late in the trial after the submission of much evidence (Tr. 6741-44).

Judge Cannella's conclusion was clearly correct, and Sarmiento's argument to the contrary is meritless. It was not "clearly inculpatory." see *United States* v. *Wingate*, *supra*, 520 F.2d at 313, since Palazzotto's testimony merely established that Arco had said a "Mono" was involved in narcotics. Nor was the testimony vitally important to the Government's case. Sarmiento's argument that Palazzotto's testimony was the only direct evidence against him ignores the testimony concerning, for example, his numerous meetings with co-conspirators, his purchase of money orders (GX 314), the seizure of records of narcotics transactions from co-conspirators naming him as the person to whom they had paid or owed tens

of thousands of dollars (GX 318) as well as records showing he had purchased cocaine from the co-conspirators (GX 324), and, most importantly, dozens of conversations in which, taken as a whole, he regularly described his narcotics activities (*e.g.*, Nos. 764, 9/3/74; 551, 7/8/74; 379, 5/14/74; 1, 5/14/74; 1706, 2/26/74. Indeed there was so much evidence linking Sarmiento to the conspiracy charged that Judge Cannella properly characterized it as almost overwhelming (Tr. 6741). Thus, this was not simply a case where the Government was simply relying on impermissible "spillover" to bridge a gap in its proof, as was shown not only by the strength of that proof but also by the continued efforts of Government counsel to avoid the problem and to repair it when it arose.

Finally, Judge Cannella's instructions to the jury cured any possible harm to Sarmiento. *United States* v. *Wingate*, *supra*, 520 F.2d at 314; *United States* v. *Catalano*, *supra*, 491 F.2d at 273; *United States* v. *Cassino*, *supra*, 467 F.2d at 623; *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1059 (2d Cir., 1970), *cert. denied*, 401 U.S. 917 (1971). Immediately after the objection and the sidebar conference on the motion for a mistrial, when questioning of Palazzotto resumed, Sarmiento's co-defendant framed his question in such a troublesome way that Judge Cannella was prompted to interrupt and further instruct the jury in words quoted in the margin.*

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* "Q. Tell us what statements were made.

The Court: I am not going to take any statements concerning any other defendants in this case. If there are in fact statements about anybody else, you are to limit yourself to this individual Arco.

Mr. Cutler: I ask your Honor to instruct the jury that your statement now should in no way imply that there were other people named by this individual in this admission.

The Court: That's so. You may not infer that. I don't want any testimony from you involving anyone else.

[Footnote continued on following page]

Moreover, the following morning, Judge Cannella announced his findings with respect to Sarmiento's motion for a mistrial based on Detective Palazzotto's testimony and then gave the jury the formal instruction quoted in the margin.* Thus, in effect, the jury was instructed twice to disregard Palazzotto's allegedly prejudicial remark.

When you answer a question, keep that in mind. This statement is only binding on Arco alone, on himself alone, period, and does not rub off on any other defendant.

Q. Tell us what Arco said.

The Court: If you cannot answer that question within the rule of the Court has put down, you simply say, I can't answer that question." (Tr. 6712-6713).

* "At the tail end of the day yesterday this witness was asked a question about whether the person whom he was interrogating mentioned anyone else. He did name someone. At that point in time there was an objection and I sustained the objection.

"This is very critical to your duties. I want to bring to your attention that you, of course, know that when you were selected each of you took a second oath—the first one, you will recall, was that you were to tell the truth, in effect, to your qualifications. The second oath was that you would try this case upon the evidence as adduced here in the courtroom and the law as given to you by the judge.

"I call your attention back to that oath. If you remember the oath, you said, 'Do you swear that you will do that-'

"The old form of that oath, was 'Do you swear in the presence of the ever-living God that you will live up to your promise?' It is just as solemn as that now and it is just as important now.

"Evidence does not include anything which the court strikes out. The court has stricken this particular item from this evidence. You may not consider it. If in any way you do so, you are stultifying your oath as a juror, and you are committing a wrong. So you will erase this incident from your mind and when you decide the case you will make no reference to it in any shape or form. You will please live up to your oath and perform your functions as directed by the court." (Tr. 6744-746).

Sarmiento's contention that Judge Cannella's clear, forceful and repeated cautionary instructions to the jury failed to fully protect him is simply incorrect. Indeed, the Supreme Court has noted that protective admonitions are effective in precisely the situation presented here. See *Bruton* v. *United States*, *supra*, 391 U.S. at 135. See also *Frazier* v. *Cupp*, *supra*, 394 U.S. at 735; *United States* v. *Wingate*, *supra*, 520 F.2d at 313; *United States* v. *Catalano* 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States* v. *Cassino*, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). Thus, Sarmiento's conviction should be affirmed.*

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* Sarmiento also contends that Palazzotto's statement at the Court's direction that he was not permitted to answer particular questions also violated *Bruton* since by implication the answer created the impression that Arco had told Det. Palazzotto something about Sarmiento. (Sarmiento Br. at 45-46). This claim is likewise without any merit. Significantly, Detective Palazzotto's response that he couldn't answer certain questions was remarkably similar to the situation in *Wingate* where portions of a post-arrest statement *naming* a co-defendant were redacted, and the jury knew only that *someone* had committed the crime along with the person making the statement. *United States* v. *Wingate*, *supra*, 520 F.2d at 312 n.2, 314. Only when combined with other evidence could the statements tend to implicate Sarmiento rather than some other one of the defendants. Under these circumstances, limiting instructions were sufficient. *United States* v. *Wingate*, *supra*, 520 F.2d at 314. See also *United States* v. *Trudo*, 449 F.2d 649, 652-3 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1058 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *Posey* v. *United States*, 416 F.2d 545, 550-51 (5th Cir. 1969), *cert. denied*, 367 U.S. 946 (1970) (statement could have referred to any one of 17 co-defendants, or to other persons); *Salwek* v. *United States*, 413 F.2d 957, 960-64 (8th Cir. 1969). *Cf. United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 4 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975).

POINT VII

Roldan's post-arrest statements were admissible.

Defendant Roldan urges that the District Court erred in failing to suppress his post-arrest statements to Assistant United States Attorney James Nesland on the ground that they were involuntary. Roldan argues that, although he was fully advised of his *Miranda* rights and answered that he understood them (Roldan Br. at 12, 14), Judge Cannella should have suppressed his statement since it was taken after he was allegedly advised that he could receive a maximum sentence of 15 years on each count of the indictment (Roldan Br. at 14-15) and since he did not have an attorney present during the interview (Roldan Br. at 15-16). Neither claim of error has any merit.*

After a suppression hearing at which only Assistant United States Attorney Nesland testified, Judge Cannella found that there was no violation of Roldan's constitutional rights. Specifically, Judge Cannella found that Roldan was apprised of his rights, that he clearly indicated that he understood what those rights were, and that he voluntarily waived them (Tr. 60-76).

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* Moreover, this argument is clearly an afterthought and has been waived since it was never raised below. *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3472 (Feb. 23, 1976); *United States* v. *Sisca*, 503 F.2d 1337, 1347-48 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). Roldan was given a copy of his statement on December 27, 1974, yet he never made a formal written motion to suppress it despite the timetable set by the Court calling for the filing of motions well before trial. Indeed, he made no motion to suppress it until the day of trial over ten months after he first became aware of the possible need to do so. When the motion was finally made, the issues raised here were never even suggested as grounds for suppression.

Roldan relies wholly upon this Court's opinion in *United States* v. *Duvall*, Dkt. No. 75-1225, slip op. 2123 (2d Cir., Feb. 26, 1976), and a tortured interpretation of the facts from which he argues that Assistant United States Attorney Nesland threatened Roldan with a seventy-five year sentence.

Assistant United States Attorney Nesland's testimony concerning this issue was limited to the following:

> "Q. Did you tell him how many counts there were against him? A. I don't recall.
>
> Q. Did you tell him he could get 15 years on each count? A. Very possibly.
>
> Q. Did you tell him he might get 90 years if he didn't cooperate? A. I doubt it. It's not my technique." (Tr. 5971-72).

There is simply nothing in this testimony to suggest Judge Cannella erred in finding that Roldan was properly advised of his constitutional rights and voluntarily consented to speak with the prosecutors. Not only is there no suggestion that Nesland threatened Roldan, but nothing in his testimony implies that he told him he would receive a seventy-five year sentence.*

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* Roldan's reliance on *Duvall* is misplaced. In that case, the Court held that a defendant's statement should have been suppressed since the prosecutor threatened him by telling him that he faced "a possible sentence of a hundred years". No such threats were made in this case. Roldan's discussion of harmless error is, therefore, superfluous.

Defendant Velez apparently claims that his statements to Mr. Nesland were also inadmissible under *Duvall*. (Velez Br. at 39). His brief, however, candidly states that his questioning was like that of *Duvall* "minus the threats". The threats, however, were the reason that this Court ruled as it did in *Duvall*. In any event, since Velez did not object to the admission of his statements

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The claim that Judge Cannella erred in failing to suppress Roldan's statement because he did not have an attorney present during his interview is likewise without merit. Indeed, Roldan concedes that he failed to ask for counsel. (Roldan Br. at 16). Without any evidence to justify his doing so, Roldan equates his position with that of co-defendant Beatrice Gonzalez, whose post-arrest admissions were suppressed on the ground that she had not waived her right to an attorney before giving her statement (Tr. 6014-15).* Roldan's position is clearly and materially different. After he was advised that he was entitled to have an attorney present during the interview and stated that he understood his rights Roldan waived his right to counsel and answered questions (Tr. 5947-50, 6016). This Court has held on myriad occasions that a defendant properly warned of his *Miranda* rights may validly waive them. See, e.g., *United States* v. *Reed*, 526 F.2d 740, 742-743 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3501 (March 8, 1976); *United States* v. *Floyd*, 496 F.2d 982, 988-989 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States* v. *Cassino*, 467 F.2d 610, 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States* v. *Sperks*, 453 F.2d 966, 969 (1st Cir.), *cert. denied*, 405 U.S. [illegible] (1972).

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below, he has waived his right to do so on appeal. *United States* v. *Rollins*, *supra*, 522 F.2d at 165; *United States* v. *Sisca*, *supra*, 503 F.2d at 1347-48. Moreover, since his statement was admitted after he testified, he had no right to object to it. *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Oregon* v. *Haas*, 420 U.S. 714, 722 (1975).

* Beatrice Gonzalez fled before trial began and was tried and convicted *in absentia*.

POINT VIII

It Was Proper for Assistant United States Attorney Nesland to testify.

Velez, relying on *United States* v. *Torres*, 503 F.2d 1120 (2d Cir. 1974), urges now, for the first time, that it was improper for the Government to call Assistant United States Attorney James Nesland to testify about various post-arrest statements made to him by Velez. That contention is without merit.*

Velez' argument utterly misconstrues the rationale of the decisions of this Court concerning the propriety of calling *trial counsel* to testify at trial. In *United States* v. *Torres*, *supra*, upon which Velez principally relies, this Court held that it was improper for an Assistant United States Attorney who was trying the case to testify as a witness, unless the Government could show that no other witness was available. At no point in its opinion, however, did the Court indicate that an Assistant United States Attorney would be barred from being a witness merely because of his position, irrespective of his total lack of participation in the trial itself. Indeed, the reliance in the *Torres* opinion on *United States* v. *Alu*, 246 F.2d 29 (2d Cir. 1957), and *United States* v. *Pepe*, 247 F.2d 838 (2d Cir. 1957), makes it crystal clear that the Court viewed with disapproval only the use of an attorney already known to the jury in his role as an advocate, and not the testimony of a non-participating federal prosecutor.*

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* In *United States* v. *Alu*, *supra*, 246 F.2d at 33, the testifying Assistant had also actually "participated in the presentation of the Government's case." The Court cited with approval Canon 19 of the American Bar Association Canons of Professional Ethics, which states:

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This rationale was recently re-emphasized in this Court's decision in *United States* v. *Estremera*, 531 F.2d 1103, 1108 (2d Cir. 1976). In that case, counsel for the defendant testified before the jury at trial concerning a pre-trial photographic identification made by a Government witness. Relying on *United States* v. *Alu*, *supra*, this Court noted that such a procedure should be used "only where unavoidable." Since this Court clearly could not have intended that all defense counsel be *ipso facto* precluded from testifying in criminal trials, even where they have not been participants, it is clear that concern was directed toward testimony by a *participant* who appears throughout the trial before the jury and whose credibility should not be put in issue.*

> "When a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, *he should leave the trial of the case to other counsel.*. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client" (emphasis supplied).

In *United States* v. *Pepe*, *supra*, the testifying Assistant was once again an active participant in the trial. Indeed, in that case he was the very attorney prosecuting the case. The court stated:

> "If it appears [the Government prosecutor] is to be a witness for the government, and obviously there are times when that cannot be avoided, the trial of the case should be entrusted to a colleague." 247 F.2d at 844.

* Velez' claim that the prosecutor in summation lost "no time in comparing the credibility of Leon Velez with that of the exalted office of the United States Attorney" is not only irrelevant but is totally unsubstantiated by the record. At no time in summation did the prosecutor suggest that Mr. Nesland should be believed simply because he was an Assistant United States Attorney. Rather, he quite properly emphasized the evasive and inconsistent nature of Velez' testimony and the manner in which it was refuted by other proof, and urged the jury that it was Nesland, rather than Velez, who should be believed (Tr. 7947-48).

In the instant case, Mr. Nesland never appeared before the jury as a prosecutor, and, indeed, was known to the jury only during his brief appearances, along with scores of others, as a witness. Thus, since this is not a case where the jury was asked to rely on the credibility of the prosecutor presenting the case to them, Mr. Nesland's testimony was entirely proper.*

POINT IX

There was no error in permitting an interpreter to compare the voices on eight disputed tapes with that on two authenticated tapes, nor did the Court's remarks bias the jury's ability to assess the authentication and comparison.

Appellant Reuben Dario Roldan ("Dario") challenges the propriety of allowing one of the interpreters, Gustavo Hoffman, to testify to his non-expert opinion regarding a comparison he had made between a particular voice (which had been independently identified as that of appellant Dario) and disputed voices on certain other tapes, to determine if they were the same speaker. Before Mr. Hoffman was called to testify, more than one person

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* Mr. Nesland testified on the Government's direct case about post-arrest statements made to him by defendant Roldan. He testified on the Government's rebuttal case about post-arrest statements made to him by defendant Velez. In addition, he was called as a witness by defendants Restrepo-Botero and Parra. None of the defendants ever objected to Mr. Nesland testifying, other than Roldan's objection to the admissibility of his statements. This failure to object bars review of this issue on appeal, *see United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966), especially since had there been an objection, the trial court may well have asked for a statement on the record why other potential witnesses were not called or solicited suggestions of defense counsel as to other possible precautionary measures, or adopted other remedial measures suggested by defense counsel.

referred to as "Dario" had been mentioned at trial (Tr. 6437) and several tapes, many of which in some way directly referred to a "Dario" had been offered in evidence. The Government offered Mr. Hoffman's testimony to help the jury determine which of the voices on the tapes referred to as "Dario" or otherwise indicated to be that of appellant Dario were in fact his.*

The Government provided Mr. Hoffman with two "control" or exemplar tapes on each of which one voice had been identified, in compliance with Rule 901(b)(6) of the Federal Rules of Evidence,** as that of appellant Dario. Mr. Hoffman then compared the exemplar voice with those on the subject or disputed tapes, and gave his opinion regarding which of the disputed voices was identical to the exemplar (Tr. 6452).

In *United States* v. *Chiarizio*, 525 F.2d 289, 296 (2d Cir. 1975), this Court approved an analogous procedure when it noted that a government agent who had heard the defendant's voice exemplar—but had never met or personally spoken with the defendant—could on that basis identify a disputed voice as that of the defendant. There is no material difference between a witness' comparison based on a voice exemplar obtained from a sample provided by the defendant and on an exemplar authenticated by a call to the defendant's house coupled with a confirming response. In both instances the identification

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* Mr. Hoffman ultimately gave his opinion that not all the voices referred to as "Dario" on the tapes were the same (Tr. 6437; see Tr. 6487). Dario's counsel emphasized this in his summation (Tr. 8052, 8066).

** Each call had been made to appellant Dario's telephone number and the person answering had either identified himself as "Dario" or responded after being addressed as "Dario" (Tr. 6439, 6470).

is based upon something other than face to face familiarity with the voice.*

In effect, all that Mr. Hoffman was asked to do was compare a given voice (voice "A") with other voices. His inability through personal contact to attach a name to voice "A" was irrelevant. Dario's complaints regarding Hoffman's admitted lack of face-to-face familiarity with Dario's voice, as well as the scope of Hoffman's review of the tapes go not to the admissibility of the testimony, but only to the weight to be accorded it by the jury. See *United States* v. *Borrone-Iglar*, 468 F.2d 419 (2d Cir.), *cert. denied*, 410 U.S. 927 (1972); *United* v. *Rizzo*, 491 F.2d 215 (2d Cir. 1974), *cert. denied*, 416 U.S. 990 (1974) (testimony admissible if identifier has heard the voice of the alleged speaker "at any time"). Certainly the jurors were aware of this argument, because Dario's own lawyer had in summation exhorted them to give the testimony little weight. (See Tr. 8051-8054.)*

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* Dario's suggestion (Roldan Br., at 20) that voice identification must be based on personal meeting was specifically rejected in *Chiarizio, supra*. See also, *United States* v. *Albergo*, Dkt. No. 75-1279, slip op. 4211, 4217 (2d Cir., June 17, 1976); *Palos* v. *United States*, 416 F.2d 438, 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970) (call to defendant's telephone number and ensuing response to defendant's name by one answering); *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964) (voice can be identified by circumstantial evidence); *Davis* v. *United States*, 279 F.2d 576, 579 (4th Cir. 1960) (agent who has heard one voice independently identified as that of defendant can testify that another voice is the same as the identified voice). *United States* v. *Borrone-Iglar*, 468 F.2d 419 (2d Cir. 1972), cited by Dario in support of his position, holds only that where there have been both personal meetings and familiarity with intercepted conversations, the foundation for identification is sufficient; the opinion does not consider the sufficiency of having only the latter.

* Nor was there any requirement that Hoffman qualify as an "expert". As the Advisory Committee notes flatly state, "aural voice identification is not a subject of expert testimony." Federal

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Nor did the Court's handling of Hoffman's testimony bias the jury to accept it. The Judge's comment that "the voice he identified was Dario's voice" (Tr. 6483, 6486), pertains not to a disputed "incriminating" tape, but to tape 439, which was one of the non-incriminating exemplar tapes (Tr. 6461; Roldan Br. at 6). That defendant Dario's voice was on the exemplar was not seriously contested. Moreover, even if the Judge should not have commented as he did, any error was cured, see *United States* v. *Borrone-Iglar*, *supra* at 421 fn.3, by other evidence, including identification pursuant to Rule 901(b)(6), which identified the voice on the exemplar as that of Dario.*

Furthermore, it was explicitly left to the jury to decide whose voices were on the tapes. Before Hoffman testified, the Court cautioned that Hoffman's opinion was not conclusive and that the jury could adopt or reject it. (Tr. 6447). Later, when he charged the jury as to voice identification the trial judge admonished the jurors not "to rely on Hoffman or anybody else . . ." and instructed that "[you] must make your own de-

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Rules of Evidence Rule 901, Note to Subdivision (b), Example 5 at p. 716. See also *United States* v. *Chiarizio*, *supra*, 525 F.2d at 296. To this end, Rule 901(b)(5) specifically provides that a voice can be identified by simple (as distinguished from expert) opinion based upon hearing the voice at any time "under circumstances connecting it with the alleged speaker." Here the "circumstances" were Hoffman's hearing the questioned tapes together with independently demonstrated samples of Dario's voice. In this respect the testimony here is not unlike the use of a witness or chart to summarize evidence when the facts summarized are also available to the jury. See *United States* v. *Nathan*, Docket No. 75-1421, slip op. 4201, 4208 (2d Cir., June 16, 1976) (charts are admissible even though not evidence in themselves).

* Nor did the Court create an "aura" of officialness about Mr. Hoffman simply because he translated for the Court. References to Hoffman as "official interpreter" were minimal, and he was one of several interpreters who participated in the trial.

termination and come to your own conclusions" (Tr. 8575). In doing so, the trial judge fully complied with the law.

POINT X

The evidence of Velez's knowledge of the existence of and membership in the conspiracy was sufficient.

Leon Velez argues that the evidence was insufficient to show his knowledge of the existence of and his membership in the narcotics conspiracy proved at trial. Because the evidence taken in the light most favorable to the Government was more than sufficient for the jury to find him to be a knowing member of the conspiracy charged, Velez's claim is without merit. The test for whether the evidence is sufficient to go to the jury is "whether upon the evidence taken as a whole, a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt." *United States* v. *Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975).* The evidence clearly meets this test.

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* Velez's brief might be read to include the suggestion that the independent non-hearsay evidence was insufficient to show velez's knowing memebership by a preponderance of the evidence, thereby preventing the use of co-conspirators' hearsay statments against him. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). The independent evidence is sufficient, not only to meet the *Geaney* standard but to convict. We will treat the independent evidence separately for the Court's conveniences, although we note that the standard of proof for purposes of admissibility of the co-conspirators' statements is less than that for determining whether to submit a case to the jury. *United States* v. *Glazer*, 532 F.2d 224, 228 (2d Cir. 1976); *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

A. Independent evidence.

The independent evidence went far beyond Velez's long and continued association with the Bravos (two principals of the organization) and frequent meeting with each of them during the period of the conspiracy. (Tr. 7302-57).

In conversation No. 39, 3/13/74, Leon Valez spoke to Alberto Bravo about Carrancho (Juan Mesa) and there is no indication from the conversation that Leon did not know Carrancho. When Alberto Bravo said "whatever had to be settled should be settled at once" and Leon responded "you alone?" the jury need not have concluded that they were talking about some fight that occurred at Madison Square Garden. The jury, listening to conversation No. 179, 3/15/75, in which Alberto asked "Have you finished or not?" and Velez responded "Man! (unintelligible) some little things for a sister that left for (unintelligible)," could well have inferred, in the context of extensive testimony about the use of codes, that this was a coded conversation involving either money or narcotics.

The events of May 7, 1974 through May 9, 1974, further made clear that Velez was a knowing member of the conspiracy. In conversation No. 130, 5/7/74, which was conducted in the code of the narcotics conspiracy, Velez attempted to ascertain whether "Mono" Sarmiento had $20,000, $25,000 or $30,000 for him ("twenty dollars or twenty five," "twenty or thirty dollars"). He warned Sarmiento to bring the money only in small amounts at a time ("little by little"). He understood Sarmiento when Sarmiento said he had $6,000 ("6") in cash ("pesos") and $37,500 more in money orders ("the other little papers" "about three, seven and a half") ("they [the money] should be divided, no?"). He displayed guilty knowledge by wanting to meet "Mono" rather than

risk talking over the phone ("and where can we talk, Mono?"). He indicated he knew the major members of the conspiracy when they were subjects of conversation and he in no way questioned references to them. Velez's knowledge can also be inferred from his patently false testimony to the effect that the "papers" to which "Mono" was referring in the conversation were papers for a horse trailer and horse supplies and not money orders (Tr. 7356-57).

On May 7th, Velez did in fact get from Sarmiento some of the money (according to Velez, $12,000, $6,000 of which he deposited in Bruno's account) and an envelope which, according to Sarmiento, contained money orders (Tr. 7359-62, 7366-71, 7424). The jury and the Court again could clearly infer Velez' knowledge of this conspiracy in Leon's false testimony that the envelope he received at that time was fully addressed to Bruno and stamped, and therefore Leon had no idea, other than Mono's word, of its contents. It is clear from the conversations that Velez was receiving money orders, the amount of which he was eager to know.*

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* After this meeting Velez again had a conversation with "Mono" that made sense only when viewed in the context of the narcotics organization's code. (No. 191, 5/8/74). In particiular, Velez told Sarmiento to have Bruno call him as soon as he got the money orders ("the things, the papers"). More clearly, "Mono" explained in code that he still had not given to Velez $13,000 which Mono had received from Libardo Gill ("As I am short thirteen things that 'El Zarco' has already given to me.") In the same conversation Leon did not say "$8,000 in cash" but "eight raw"; and the frequent use of cryptic phrases and a prearranged narcotics code provide an ample basis for the jury to infer that Velez was a knowing participant in this conspiracy. *United States* v. *Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Cirillo*, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

On May 9, Leon got a box containing a large amount of cash from Mono and deposited $4,000 of it in Bruno's bank account (Tr. 3962-73, 4028-30, 7366-7371). In the phone call setting up the meeting, Leon did not say "bring me the box" or "bring me the money." He said "would you be able to bring down that *thing* for me?" (No. 220, 5/9/74). Velez's receipt of substantial amounts of money on two occasions from a person deeply involved in importing large amounts of cocaine and marijuana is by itself, substantial evidence linking Velez to this conspiracy. *United States* v. *Tramunti*, 513 F.2d 1087, 1108 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Mallah*, 503 F.2d 971, 875 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).*

Finally, Velez' knowledge of the conspiracy could also be inferred from his false exculpatory statements to Assistant United States Attorney Nesland to the effect that 1) he never discussed money orders with Alberto or Bruno Bravo or sending money orders to them, 2) he had nothing to do with giving money to Alberto or Bruno, and 3) he never got any money from Mono or had a conversation to this effect (Tr. 7715-17). Indeed, this Court has recently noted that frequent association with conspirators coupled with a false exculpatory statement is sufficient to support a conviction. See *United States* v. *Gentile*, 530 F.2d 461, 464-65 (2d Cir. 1976). See also *United States* v. *Johnson*, 513 F.2d 819, 824 (2d Cir. 1975); *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States* v. *Smolin*, 82 F.2d 782, 786 (2d Cir. 1950).

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* These cases dispose of Velez's contention that the money could have been part of a black market money exchange business and not a narcotics business, even assuming that had been Velez's defense to begin with.

B. Non-independent evidence.

The foregoing evidence was in itself sufficient not only for the Court to conclude by a preponderance of the evidence that Velez participated in the conspiracy and to allow co-conspirators' statements into evidence against him, but also sufficed for the jury to find Velez a knowing member of this conspiracy beyond a reasonable doubt. Indeed, the hearsay statements are but a little additional icing on the cake. They show that Velez, in addition to the money he received on May 9th, in fact received $45,500 in narcotics proceeds in the form of money and money orders from Mono on May 7th as part of a total payment to Bruno and Bernardo amounting to $64,500.

"Mono" Sarmiento's conversations with Jorge and Arturo Gonzalez showed that Leon was known to them both; that when Mono did not get confirmation of receipt of the money which Leon had sent to Colombia he "sounded off to Leon" about it * (No. 393, 5/14/74); and that Leon Velez was to get an additional $1,400 from Mono by May 16th to send to Bruno but Mono had lost Leon's number and so had not given him the money (No. 453, 5/16/74).**

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* This again indicates that Velez' trial testimony was not entirely truthful, as he stated he had never seen Mono after May 9th nor spoken to Mono on the phone except in the conversations in evidence. That Velez consciously minimized his relationship with Mono is indicated by his first conversation with Sarmiento in which Velez refers to Sarmiento (a person whom he was supposed to have met just once) as "Pacho" and "my son." (No. 130, 5/7/74).

** In addition, of course, when Velez testified he forfeited his right to have the sufficiency of the evidence viewed on the basis of the Government's case alone; this Court should review the entire record, including his own testimony, to assess the sufficiency of the evidence against him. *United States* v. *Singleton*, 532 F.2d 199, 120-21 (2d Cir. 1976); *United States* v. *Pui Kan Lam*,

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Accordingly, the evidence of Velez's knowing involvement in this conspiracy was shown by 1) his receipt of some $58,500 or $59,500 in narcotics proceeds for Bruno and Alberto Bravo; 2) his continued use of the code language of the narcotics organization in his conversations with "Mono" and Alberto; 3) his familiarity not only with Alberto, Bruno and "Mono" but with the names Carrancho, Perro, El Zarco (Libardo Gill), and Bernardo, and his, in turn, being known to Jorge and Abraham Gonzalez, all demonstrated members of this conspiracy; 4) his false exculpatory testimony at trial and false post-arrest statements to Nesland, and 5) the nature and content of his own testimony.

Especially since, as this Court has noted, only slight evidence is necessary to demonstrate participation in a conspiracy once the fact of the conspiracy itself is established, *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), Velez' claim of factual insufficiency is frivolous.

POINT XI

The independent non-hearsay evidence was sufficient to admit hearsay statements of co-conspirators against Gonzalez; the evidence in support of his conviction was more than sufficient.

Jorge Gonzalez appears to concede that once the hearsay statements of co-conspirators were admitted against him, the evidence of his guilt was sufficient to support the conviction, and indeed no other position is plausible under

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483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). As this Court has recently noted, the evasiveness of and contradictions in a defendant's testimony itself may be substantial evidence of guilt. *United States* v. *Mariani*, Dkt. No. 76-1075, slip op. 5045, 5052 (2d Cir., July 19, 1976).

the facts of this case. Rather, he claims that "[t]here is no independent proof that appellant was a member of any narcotics conspiracy or even knew that such a conspiracy existed". (Gonzalez Br. at 20). In particular, he argues that the independent proof showed nothing more than his using innocent language in mere association with co-conspirators.

To the extent appellant's brief makes the bizarre claim that, in determining whether the independent non-hearsay proof was sufficient for the Court to find him a member of the conspiracy, defendant's own incriminating words must be excluded unless they are entirely unambiguous, it is, of course, totally in error, as *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), makes clear.* Defendant's own statements (whether or not in code) are not hearsay, see Rule 901(d)(2) of the Federal Rules of Evidence, and are independent proof which can be weighed in determining the defendant's participation in this conspiracy.** E.g., *United States* v. *Sisca*, *supra*, 503 F.2d at 1343-44; *United States* v. *Cirillo*, *supra*, 499 F.2d at 883, 888; *United States* v. *Manfredi*, 488 F.2d 588, 596-7 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Santana*, 503 F.2d 710, 714 (2d Cir.), *cert. denied*, 419 U.S.

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* This apparent misconception appears to be the reason for this frivolous claim. That Jorge's conversations may not always be unambiguous to the listener is a tribute to the sophistication of the conspiracy's communication system. What is unambiguous is that Mono and Jorge repeatedly communicated in code in furtherance of the conspiracy. Furthermore, the use and purpose of the code was explained to the jury by accomplices and undercover policemen who used it, and thus there could not have been any misunderstanding about the nature of the coded conversations.

** Even statements made in the presence of the defendant by other co-conspirators which are not repudiated by the defendant are properly considered as part of the independant non-hearsay proof. *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975).

1053 (1974), 420 U.S. 963 & 1006 (1975); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

Here, Gonzalez' conversations and other independent non-hearsay evidence against him were far more than sufficient to find beyond a reasonable doubt, much less a preponderance of the evidence, that Gonzalez was not using innocent phrases but rather was an intimate co-conspirator. The evidence from Jorge Gonzalez' taped conversations shows that he assisted Sarmiento, Arturo Gonzalez, and Bruno Bravo in bringing in the shipping containers in which narcotics were transported and in dealing with Suarez Imports in New Jersey, Olivo Santos-Castillo, Oscar Perez and Perez' company Las Americas in connection with the containers. (No. 146, 5/7/74; No. 453, 5/16/74; No. 553, 5/20/74; No. 595, 5/21/74; No. 720, 5/25/74; No. 984, 5/27/74; GX 436, 439, 552, GX 440, GX 440A-F, GX 441, GX 441A-C; Tr. 6247-50, 6280-84).*

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* It was clear from these conversations that Jorge knew that Mono had paid Oscar Perez $4,200 which Perez had improperly appropriated. It was further clear that Jorge knew Perez would have to "face . . . Bruno" (Bravo) as it was Bruno who gave the "authorization" to give Perez the $4,200. Finally, it is clear that he was aware of the approximately $55,000 or $60,000 (in code: "Fifty-five or sixty apparatuses") Sarmiento nearly lost because of the theft by Bernardo's friend (Hamilton) and that he was aware Sarmiento was "unloading" most of the money to Bruno in Colombia and Leon Velez was involved in that process (No. 146, 5/7/74; No. 453, 5/16/74). Jorge said it was "we" who were supplying them (Alberto and Bruno) with the money and Jorge alluded to one time he himself had delivered some money to them. Sarmiento on several occasions complained to Jorge how inconsiderate it was for the people in Colombia not to tell him they had received the money he had sent to them, so that he could destroy the money order receipts. (No. 453, 5/16/74; No. 553, 5/20/74).

Conversation No. 720 of May 25, 1974, alone demonstrates beyond any doubt Jorge's knowing participation in this conspiracy.* In code Jorge and "Mono" discussed a shortage of narcotics from Colombia and that they could have "moved more" if there were somebody to handle the situation. Jorge agreed that the people in Colombia took too long to react to the situation and they needed people with more drive. Jorge stated that with Pachito (Mono) organizing things "we would have had several lots." Mono and Jorge discussed in code the fact that the reason there was a shortage was that the people in Colombia were looking for high quality narcotics ("first class cattle", "good stuff" "lean cattle is useless"), the kind of narcotics that "can sweep the whole market." Mono told Jorge he would like to have some money to take to the people in Colombia to pay for the "organization" of the "cattle" there. Mono told Jorge in this conversation he would send "stuff" from South America through Las Americas shipping and was going to make "the contact" in Central America. Mono asked Jorge as to the disposition of the furniture that came in containers and what happened to "those machines . . . those pieces of furniture" (brought in containers holding narcotics in the ceilings and walls). Mono told Jorge to get rid of the furniture at any price

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* Counsel for Gonzalez left this conversation as well as several other incriminating conversations out of his appendix. Also, for some reason, appellant Sarmiento's fairly comprehensive digest of the facts introduced against him leaves out all the conversations between Sarmiento and Jorge. The reference in No. 553, 5/20/74, where Jorge asks whether or not they are doing something illegal, is not in reference to the entire conspiracy but whether their shipment of furniture, *qua* furniture, was legally being imported.

he could get indicating that something in the containers other than the furniture was of importance to them.*

Jorge's consciousness of guilt and participation in the conspiracy is also revealed by his realization that he could not discuss certain subjects over the telephone with Mono (No. 784, 5/27/74) and his realization that Mono's telephone number could not be given out without clearing it with Mono first (No. 453, 5/16/74).

In sum, Gonzalez' guilty knowledge of the conspiracy could be inferred from the secrecy of the transactions and the use of the specialized code. From the secrecy of the transactions and use of codes of the narcotics organization guilty knowledge of this conspiracy could be inferred *United States* v. *Agueci*, 310 F.2d 817, 828

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* On May 20, Mono asked Gonzalez if Arturo Gonzalez, who unquestionably dealt in narcotics, left any money for Mono. Gonzalez said, despite the fact that Arturo had not given him orders to leave Mono money, Mono could come by at any time. In another coded conversation, Mono and Jorge discussed sending "motors" to Colombia. Mono told Jorge that, after the "motors" were turned over to some one in Medellin, an "apparatus" would be available for the return—again indicating Jorge's knowing association with the container shipments and the use of the conspiracy's code. (No. 553, 5/20/74; see also, No. 595, 5/21/74). Jorge later informed Mono the thing about the "motors" did not work out. (No. 657, 5/23/74).

On another occasion after Jorge asked Mono if Carlos Guarin, Sr. had any "blank paper" (referring probably to cocaine), Mono said that Guarin had been asking for Alberto Bravo to send him "something" but Alberto sent him nothing. Jorge then responded: "I need a . . . a . . . a . . . few small pads, a few sheets" (No 453, 5/16/74). On another occasion Jorge reported to Mono that reliable sources in Medellin, Colombia told him "three thousand kilos of . . . something" were stolen from them in New York and, Mono said "these people should not know anything about the affair." Jorge responded "no one has to know anything about it—that was done by us". (No. 553, 5/20/74).

(2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Cirillo*, *supra*, 499 F.2d at 888; *United States* v. *Sisca*, *supra*, 503 F.2d at 1343-44.

Furthermore, when Gonzalez was arrested, he was carrying not only false identification, but also the phone numbers of the 30th Street stash apartment and of Marconi Roldan providing additional circumstantial—but non-hearsay—evidence of his participation in this conspiracy (GX 476 A-B). See *United States* v. *Ruiz*, 477 F.2d 918, 919 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973); *United States* v. *Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), *cert. denied*, 401 U.S. 967 (1971). Accordingly, Gonzalez' claim of lack of sufficient independent non-hearsay evidence of his participation is frivolous.*

POINT XII

The appellants were all members of a single conspiracy.

A. Summary

The appellants in their joint brief argue that the facts at trial proved multiple conspiracies rather than the single conspiracy charged in the indictment. In fact, as the jury found, the evidence at trial showed that through October 1974, the appellants and others were part of a single, on-going conspiracy to import from Colombia, South America into the United States massive quantities of cocaine for distribution in New York City.

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* If, in fact, Gonzalez' brief also raises the issue of the sufficiency of the evidence for the jury to find him guilty beyond a reasonble doubt it is clear the evidence described above provides ample basis to affirm his conviction and there is no need to recount the hearsay evidence against him as well.

The arguments made by the appellants to the contrary rely not only on a misreading of the controlling law in this circuit but on manifest distortion of the facts in the record and of the inferences the jury could properly draw therefrom.

Initially, it should be noted—as appellants do not—that the question whether the Government has shown multiple conspiracies or a single conspiracy is primarily one for the jury to decide rather than the trial judge or this Court. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Torres*, 519 F.2d 723 (2d Cir.), *cert. denied*, — U.S. —, — U.S.L.W. — (Dec. 8, 1975); *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971); *United States* v. *Dardi*, 303 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Crosby*, 294 F.2d 928 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1961).* Thus, the true issue on appeal is whether, when viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the evidence was sufficient for the jury to find that a single conspiracy existed. Furthermore, even if the overall conspiracy could be envisioned as being composed of component parts, "where there was proof of the single, overall conspiracy, the fact that there also

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* This point alone serves to illustrate the contrived and factitious nature of the present claim, since of all the defendants at trial only three, Parra, Robinson and Jorge Gonzalez argued the single/multiple conspiracy issue to the jury in summation. In total their arguments took at most four pages of the transcript. (Tr. 8018, 8378-79, 8217). While such argument was not necessary, as a technical matter, to preserve the issue for appeal, it serves to underscore the fact that the indignation voiced in the joint brief was generated solely for this Court, and was not generally presented to the fact-finding body primarily responsible for determining the issue.

was evidence adduced of other conspiracies or that the jury could have found two *major* conspiracies does not require a mandatory charge of acquittal." *United States* v. *Tramunti*, 513 F.2d 1087, 1108 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). We submit that the cumulative weight of al' of the relevant indicia, see *United States* v. *Tramunti*, 513 F.2d at 1106, far more than met the Government's burden in this regard. Indeed, the facts presented to the jury and the inferences that they could—and apparently did—properly draw from those facts overwhelmingly demonstrated a single, rather than a multiple, conspiracy. We shall now turn to a discussion of those criteria.

B. The personnel.

The core of this organization was located on an almost permanent basis in Colombia, South America, the source country for the cocaine it distributed (Tr. 1730). At the very top of the organization were two brothers, Alberto and Carlos ("Bruno") Bravo, owners of an export-import business. Each was the ultimate recipient of the money sent to South America, representing either profits of their narcotics business or funds to finance additional cocaine purchases. Bruno Bravo received money from the sale of narcotics from Mario Rodriguez (GX 521) and Pepe Cabrera (GX E163c-1) and appellants Sarmiento (Tr. 7371; *e.g.* No. 206, 211, 5/8/74) and Libardo Gill (GX E163c-1).*

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* Alberto Bravo occasionally came to the United States where he met Cabrera in the first half of 1973 (Tr. 1526), and Mario Rodriguez (Tr. 3949-3678-80; GX 180;No. 1026, 2/13/74) and appellants Sarmiento and Velez in 1974 (No. 39, 3/13/74; No. 179, 3/15/74, Tr. 7328-33). He also collected either in New York or in Columbia proceeds of the narcotics business from appellant Sarmiento through appellant Velez (Tr. 7425) and from Cabrera through Carmen Caban (Tr. 1163-64).

The organization also had two other key executives in Colombia to organize shipments of cocaine to the United States. One, Griselda Blanco, recruited young women to smuggle cocaine into the United States and had a factory which manufactured undergarments and other smuggling devices for this purpose. She and Cabrera unsuccessfully tried to recruit Carmen Caban to bring a shipment of cocaine into the United States during a trip by Caban to Colombia to deliver money to Alberto Bravo (Tr. 1316-20, 1599). From Colombia, Griselda Blanco participated in making the arrangements for couriers who made deliveries to appellant Botero (Tr. 1447-49) and Cabrera (Tr. 1316), specifically through appellants Parra and Gomez, couriers arrested in July, 1973 bringing cocaine to Cabrera and Botera (Tr. 1447-49) and Antonio Romero who was arrested in 1972 with approximately 3 pounds of cocaine concealed in the false bottom of a cage containing a live dog (GX 70, 70A, 80, 81; Tr. 1292-93, 1421). Moreover, she continued to work closely with Sarmiento and Cabrera through 1974 (No. 154, 7/2/74).

The other key man in the Colombian end of the organization was Bernardo Roldan, who provided Griselda Blanco with false passports for the couriers she recruited (Caban Tr. 1169, 1393, 1422). He did this from 1973, when Griselda Blanco introduced Carmen Caban to him, through July 1974, when he provided passports for Carmensa Gomez and Raul Diaz, two couriers arrested at JFK International Airport smuggling approximately one kilogram of cocaine to Mario Rodriguez (Nos. 124, 7/1/74; 119, 7/1/74; 20, 6/9/74; Tr. 5179, 5197).*

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* Much like Alberto Bravo, Bernardo Roldan occasionally travelled to the United States. In 1974, he came here to meet with Arturo Gonzalez, and appellants Sarmiento and Ruben Dario Roldan (Tr. 4416-29).

Those who ran the organization in the United States consisted of a number of importers, Cabrera, Arturo Gonzalez, Mejias, Mario Rodriguez and appellants Jorge Gonzalez, Sarmiento, and Botero, all of whom got their cocaine from the Colombian headquarters of the organization and, when necessary, provided cocaine to restore each others' diminishing reserves.* In addition, Griselda Blanco was mentioned in connection with deliveries to Botero, Cabrera, Sarmiento and Mario Rodriguez (Tr. 1323-29, 1166-67, 1260-69, 2339-2346; Nos. 727, 9/2/74; 154, 7/2/74).

Alberto Bravo was also a direct recipient of money paid for cocaine provided to Cabrera, Botero, Sarmiento and Libardo Gill. (E.g. Tr. 1447, 1525, 1566; GX 365, Tr. 7360, 7366). Moreover, Alberto Bravo himself arranged shipments of narcotics, not only to Sarmiento (No. 337, 5/13/74) but also to Cabrera (Tr. 1930, 2409), Mejias (No. 1760, 2/26/74) and to Arturo Gonzalez. (Nos. 1, 5/4/74; 337, 5/13/74).

The wholesalers on the American end of the organization were, among others, Libardo and Carmen Gill and Ruben Dario Roldan. As the joint brief diagram concedes, these people worked directly for Sarmiento in distributing the cocaine and marijuana he imported (Joint Br. at 39; see, *e.g.* GX 365).

Finally, none of the distributors at the retail level were on trial. Indeed, the remaining category of organization members on trial were the couriers Parra and Gomez who brought cocaine to Cabrera and Botero on two occasions and one occasion respectively. They like Antonio Romero were also sent by Griselda Blanco. (Tr. 1235-44, 1254-58, 1266-69).

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* For example, an analysis of money orders deposited in an account of Bruno Bravo showed payments made to him by Cabrera, Sarmiento and Libardo Gill, and records kept by Mario Rodriguez show at $5,000 payment to him (GX E163c-1, GX 521).

C. The relationships among the conspirators.

At page 39 of their joint brief, appellants present this Court with a diagram of the conspiracy as they view it. While we submit—and will demonstrate—that the diagram overstates the divisions in the conspiracy in a manner simply inconsistent with the proof at trial, the diagram indicates that appellants concede that the members of each of the groups dealt in a conspiratorial relationship with others in that group. Further, they concede that the segments they call "one" and "three" had a common source, the "Bravo Group," which included Alberto and Bruno Bravo, Griselda Blanco and Bernardo Roldan, and a common importer, Cabrera. (Joint Br. at 41). Taking such concessions and adding to them the proof that there were six additional men common to each group other than Cabrera, all of whom are missing from appellants' diagram,* as well as the proof of common direction from the core of the organization, *cf. United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), the evidence more than sufficed for the jury to find the existence of a single conspiracy, *United States* v. *Tramunti*, *supra*, 513 F.2d at 1106.

In the first group were the Bravo Group, appellants Sarmiento, Carmen Gill, Libardo Gill and Ruben Dario

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* There simply is no substance to appellants claims that except for the Bravo Group and Cabrera, there were no persons common to each group. (Joint Br. at 41-42). The core group of exporters and the men common to the so-called first and third groups were Alberto Bravo, Bruno Bravo, Griselda Blanco and Bernardo Roldan, the core group of exporters, and Cabrera, Hugo Diaz, Alvaro Hernandez, Botero, Arturo Gonzalez and Cesar Riveros-Rincon, a core group of importers.

Roldan and co-conspirators Rev. Alberto Mejias and Mario Rodriguez.* In addition, Leon Velez received narcotics proceeds from Sarmiento on more than one occasion for payment to Alberto and Bruno Bravo (Tr. 3962-73, 7360, 7366, GX 165; Nos. 130, 5/7/74; 191, 5/8/74; 206, 5/8/74). Arturo and Jorge Gonzalez worked closely with "Mono" Sarmiento on a regular basis making arrangements for, among other things, the importation of tons of contraband (Nos. 82, 6/11/74; 107, 5/6/74; 146, 5/6/74; 453, 5/16/74; 720, 5/25/74; 731, 5/26/74; Tr. 6247-50, 662680-84;GX 440, 440A-F, 441, 441A-C 480-489, 480A, 482A, 482A, B, 485A, B, 489A). When, on September 3, 1974, Sarmiento was arrested, Arturo Gonzalez called Mario Rodriguez in an attempt to locate him and after doing so and arranging for a lawyer to represent Sarmiento, told Mario that he was present in the United States to cover such matters on behalf of the members of the organization (No. 893, 9/5/74). Later, when Arturo Gonzalez himself was arrested, he was with Jorge Gonzalez and Cesar Riveros-Rincon (Tr. 5914). Cabrera was also a member of the conspiracy. He purchased narcotics from and sold to Mejias (GX 325, 327, 341, 416, 425) and worked closely with Mario Rodriguez (No. 727, 9/2/74; 1089, 10/3/74). Moreover, he was closely associated with Alvaro Hernandez ("Balmore") who was arrested in the apartment of Mario Rodriguez at the time of the latter's arrest (No. 1089, 10/3/74; 299, 8/24/74; 344, 8/24/74; 507, 8/29/74;Tr. 6402-6408). Hugo Diaz, an associate of Botero, was a source of approximately $12,500 worth of cocaine for Mario Rodri-

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* Conspicuously absent from appellants' diagram was any mention of Cabrera, Alvaro Hernandez, Hugo Diaz, Cesar Riveros-Rincon, Arturo Gonzalez, the latter's half-brother, appellant Jorge Gonzalez (Tr. 6664) or appellant Leon Velez. Clearly, all the omitted persons were part of the same conspiracy with those named.

guez in July, 1974, and continued his association with him through September, 1974 (Tr. 5037-42; No. 618, 621, 7/10/74).*

Appellants' diagram of what they call "segment one" again includes the Bravo Group, appellant Botero, Cabrera, Morty Carlin and Government witnesses Carmen Caban and Renee Rondinell ("Rita [illegible]") but conspicuously omits Cesar Riveros-Rincon, Arturo Gonzalez, Hugo Diaz, Alvaro Hernandez and appellants Parra and Gomez, couriers for Botero. Parra and Gomez and other couriers delivered cocaine which was divided by Botero,

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* All the appellants were also related by a common nationality, Colombian, and in the case of Bernardo Roldan and appellant Ruben Dario Doldan, and Arturo Gonzalez and appellant Jorge Gonzalez, by blood. Moreover, the existence of one group was clearly established in this case by the wiretaps and suveillance which produced evidence of continuous involvement of virtually all the appellants. *United States* v. *Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Calabra*, 449 F.2d 885, 893 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971). Here the wiretaps began in January 1974, and continued through October 4, 1974. In addition to hundreds of conversations in evidence, dozens of which were between Mario Rodriguez, Sarmiento, Mejias, Alberto and Bruno Bra[illegible] Bernardo Roldan and others, the following persons were recorded in narcotics conversations with one another:

Mario Rodriguez and Pepe Cabrera (No. 507, 8/29/74);
Mario Rodriguez and Arturo Gonzalez (No. 727, 9/2/74);
Mario Rodriguez and Hugo Diaz (Nos. 618, 621, 7/10/74).

In addition, surveillance placed Sarmiento with Arturo Gonzalez, and Mario Rodriguez with Alvaro Harnandez (Tr. 6402-08; GX 542) and Hugo Diaz (Tr. 5040). Moreover, the conversations showed knowledge by the following parties of others in the conspiracy in addition to those who constituted the "Bravo Group":

Mario Rodriguez of Botero (Nos. 263, 7/4/74; 174, 8/20/74);
Mario Rodriguez of Cabrera (No. 299, 8/24/74);
Mono of Cabrera (No. 670, 5/23/74);
Mario Rodriguez of Arturo Gonzalez (No. 893, 9/5/74).

Cabrera and Arturo Gonzalez (Tr. 1239-40). Botero, Rincon, Arturo Gonzalez and Cabrera worked together selling cocaine (Tr. 294, 779-80, 1281; GX 7) and among their customers were Carlin and Rita Ramos (Tr. 231, 264, 294, 1277). In addition, Alvaro Hernandez negotiated with Botero in the presence of Rita Ramos (Tr. 274-77).

The evidence, furthermore, was more than sufficient to demonstrate that the members of so-called "segment two" also conspired with the others named in the indictment. To support their contrary analysis, the appellants argue that "group two" is a distinct conspiracy, although Cabrera is a member, because the source of the cocaine was different and because Cabrera fled New York in July 1973 and was thereafter operating in Miami, Florida. (Joint Br. at 40). This analysis is completely misleading.

The contention that Cabrera's relationship with Billy Andries represents a totally distinct conspiracy ignores all those factors that establish that relationship as part of the single conspiracy charged. First, Billy Andries was merely another courier for Cabrera and the fact that he delivered cocaine in loads of twenty rather than two kilograms at a time and that he was helped by other men rather than operating alone does not change the position he held in the conspiracy.* Second, Billy Andries began to carry cocaine to Cabrera in December 1972, and did so through March 1974. Thus, the time of Cabrera's association with Andries is contemporaneous with his association with the other co-conspirators and began long before the time when appellants claim Cabrera fled to Florida (Tr. 1997). Third, the cocaine and marijuana

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* Indeed, appellants concede that Andries was certainly not the source of the cocaine delivered to Cabrera.

which Cabrera received through Andries was carried to New York City for distribution, just like all the cocaine and marijuana imported by the organization (Tr. 2015, 2337-39, 2347, 2392-99). There is no evidence to suggest Cabrera fled New York to operate exclusively in Miami as appellants assert. Indeed, Cabrera moved to New Jersey in May 1974 and he and Mario Rodriguez each dealt with the other in late 1974 at a time when Cabrera had moved to New Jersey (GX 60).

Fourth, the sharing of personnel, as well as the role of Cabrera, shows the unity of the conspiracy. Cabrera was assisted in bringing the cocaine to New York by Carmen Caban and Botero, both acknowledged members of the so-called other groups.*

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* Botero's assertion that the jury could not infer he assisted Cabrera at the time he was dealing with Andries is belied by his own concession that he and Cabrera plotted to steal cocaine in Miami (Bostero Br. at 28), his presence in Miami with Pepe Cabrera on another occasion for the purpose of bringing cocaine to New York and the evidence that placed them as constant business associates from late 1971 through July 1973 (Tr. 294, 423-24, 1144-5, 1152, 1452, 1502-03).

Appellants rely heavily on Andries' testimony that, with respect to a single delivery of cocaine, a man ("Bravo II") other than defendant Alberto Bravo was the source for the cocaine delivered by Andries to Cabrera. They ignore the absence of any proof that "Bravo II" had become the new and exclusive source for Cabrera, as well as the evidence that suggests that Cabrera never ended his association with his customary, if not exclusive source, the co-defendants Alberto and Bruno Bravo and Griselda Blanco (1616, 2/25/74; 299, 8/24/74; GX E 163c-1). At best, the evidence suggested that Cabrera had a source in addition to Alberto Bravo. Indeed, Andries never identified "Bravo II" as the ultimate source but merely as the man who paid Gaston Robinson $10,000 with respect to one of the deliveries Andries made into Miami (Tr. 1995). Even with two sources, given the tremendous scale at which Alberto Bravo and "Bravo II", through Andries, made deliveries to Cabrera, since Cabrera was a com-

[Footnote continued on following page]

D. The means and other indicia of a single conspiracy.

In addition to the overlap of personnel, virtually every other criteria to determine a single conspiracy was forcefully demonstrated in this case.

First, the scale of this operation allowed the jury to find that each of the conspirators was aware that he was participating in a large, although loosely organized, framework. This was not a group of individual narcotics dealers who conducted a modest business to sustain a subsistence level standard of living. This was an organization where the importers and wholesalers imported and sold hundreds of thousands of dollars worth of cocaine on a regular basis with a street value in the millions of dollars.*

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mon distributor linking the two alleged organizations the evidence was sufficient for the jury to find one conspiracy. *United States* v. *Tramunti, supra,* 513 F.2d at 1106. Moreover, it was a jury question which they could and did resolve against appellants whether Cabrera was buying from the Bravo Group with Andries acting as courier or buying from a totally new group, or Andries himself. *United States* v. *Torres, supra,* 519 F.2d at 728.

* a) Pepe Cabrera on at least one occasion counted $50,000 in proceeds from the sale of cocaine and received an average of 1 to 3 kilos at a time which he sold for between $24,000 and $30,000 per kilogram (Tr. 1445, Tr. 1999). His profits were huge also; on one occasion he reported that $200,000 was stolen from him on a buying trip to Colombia (Tr. 1433).

b) Edgar Botero sold cocaine to Rita Ramos in one pound quantities (Tr. 264, 1275-77) and received it in kilogram quantities (Tr. 1239, 1265).

c) Hugo Diaz sold Morty Carlin marijuana weekly while Rita Ramos worked for him (Tr. 201, 205, 1149) and sold a ½ kilogram of cocaine to Mario Rodriguez for $12,500 in July, 1974 (Nos. 618, 621, 7/10/74).

[Footnote continued on following page]

d) Arturo Gonzalez received deliveries of cocaine in kilogram quantities from couriers whose deliveries were purchased in part by Botero and Cabrera (Tr. 1239-40). Moreover, he negotiated with Sarmiento in kilogram quantities (Nos. 393, 5/14/74; 657, 5/23/74; 201, 7/3/74) and assisted Sarmiento with the help of appellant Jorge Gonzalez in importing tons of marijuana and cocaine. See p. 96, *supra*.

e) Sarmiento had four wholesalers who worked almost exclusively for him: Botellon and appellants Ruben Dario Roldan, Carmen Gill and Libardo Gill, as well as Jorge Gonzalez who acted as liason between Sarmiento and Arturo Gonzalez. By Mario Rodriguez' account, Sarmiento was responsible for importing a "flood of everything" (No. 263, 7/4/74). One page alone of Libardo Gill's records shows he sold approximately 5 kilograms of high quality cocaine (GX 365, p. 15, Tr. 6936-46) and that he sold in conjunction with Mono (GX 365, p. 15). "The Priest" once ordered three kilograms of cocaine from Sarmiento (No. 376, 5/13/74) and Sarmiento himself once bragged that he had laundered $60,000 in cash into an equivalent amount of money orders in one hour and a half (No. 699, 9/1/74). At the time of Sarmiento's arrest he was meeting Hugo Ramirez, another wholesaler, who had a payment of $10,000 in money orders on his possession. As an indication of how well his wholesalers did, Carmen and Libardo Gill had $70,000 in cash and $70,000 in money order receipts in their apartment at their arrest and Carmen Gill had $65,500 in a personal safe deposit box (GX 350-54, 378-382).

f) Mario Rodriguez imported and sold cocaine on a massive scale. In the course of one ten-day period, Mario Rodriguez lost to seizures by Customs agents and police approximately two kilograms of cocaine being imported through Germany in false bottom suitcases (Daniel Torers, July 7; Tr. 5146 *et seq.*); approximately one kilogram of cocaine being imported through Toronto in hollow wooden coat hangers (Moren, July 14; Tr. 4835); and approximately one kilogram of cocaine being imported through Aruba in a woman's undergarments (Carmensa Gomez, July 11, (Tr. 5197, 5179-5202, Nos. 208, 7/3/24; G 96, 7/4/74). In that same period he purchased a ½ kilogram of cocaine from Hugo Diaz (July 10, 1974, Tr. 5037-42). At the time of his arrest, he had a ½ kilogram of cocaine in his apartment and, in a stash apartment, approximately five bottles of lactose used to dilute cocaine, 339 pounds of marijuana and a marijuana press with a 30 ton capacity 400 A-C, 400 D 1-6, 405 B-C).

g) Mejias also imported and sold on a large scale. Records

[Footnote continued on following page]

Therefore those appellants who, like Cabrera, were major importers and wholesalers, namely, Sarmiento, Libardo Gill, Carman Gill, Jorge Gonzalez, Ruben Dario Roldan and Botero, must have known that they were linked to the overall plan to distribute massive quantities of cocaine. *United States* v. *Leong*, Dkt. No. 76-1001, slip op. 4347, 4352 (2d Cir., June 23, 1976); *United States* v. *Papa*, 533 F.2d 815 (2d Cir. 1976); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Sperling*, 506 F.2d 1323, 1340 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Aroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

This presumption was none the less reasonable where, as here, the organization used myriad channels to ship the cocaine –and, therefore, a number of importers to receive it, *United States* v. *Leong*, *supra*, slip op. at 4351; *United States* v. *LaVecchia*, 513 F.2d 1210, 1218 (2d Cir 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. — (U.S. —, 1976). Indeed, because of the large scale of the operation, a single conspiracy would exist here even if the Government had not proved—as it did—that each importer knew of the others. *United States* v. *Leong*, *supra*. Based on the large scale of this operation, and

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seized at his arrest showed sales totalling 15 kilograms of cocaine for September 2, 1974 (GX 328). In addition, a letter seized stated he had received 4½ plus kilograms of cocaine in June, 1974 (GX 330, 341). Moreover, he ordered cocaine from Mono on one occasion totalling a minimum of three kilograms (No. 376, 5/13/74). Finally, the proceeds of sales in his possession at the time of his arrest were $111,000 in his apartment and $26,000 in a personal safe deposit box (GX 342, 343, 323 *et seq*).

membership in it or other importers, wholesalers and the exporters, the jury could infer that each appellant was aware of his part as one in a much larger organization. *United States* v. *LaVecchia, supra*, 513 F.2d at 1219; *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. — (1976); *United States* v. *Bynum, supra*, 485 F.2d at 496.*

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* The evidence established that the importers common to the so-called two groups were operating from 1972 through 1974. While there was virtually no evidence against the importers Sarmiento, Mejias and Mario Rodriguez until early 1974, it is clear they joined the regular members of the conspiracy and are liable for all that preceeded them. *United States* v. *Torres*, 503 F.2d 1120 (2d Cir. 1974); *United States* v. *Sansone*, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956).

Furthermore, Appellants' argument that there were three separate conspiracies because each operated in a different time frame is also without merit. (Joint Br. at 40-42; Botero Br. at 19, 25). The premise for this type of analysis is a finding of an affirmative act ending each conspiracy, since the mere fact that there is a time gap or a change in membership is irrelevant. *United States* v. *Stromberg*, 268 F.2d 256, 264-65 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973). However, no such evidence exists. Indeed, the argument not only ignores appellants' own concession that the Bravo group continued as the core of the first and last segments covering the full range of time during which the single conspiracy proved at trial operated, but the evidence that there were at least six other members common to each period. The time argument also fails with respect to the Andries/Cabrera group since it operated during a period overlapping each of the others. The withdrawal of Andries and the arrest of others associated with Andries may have ended *their* participation in th conspiracy as did the arrests of Caban and Rita Ramos. However, the end of participation by one co-conspirator does not end the existence of the conspiracy itself. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). The extent to which Appeliants have gone in misstating the record is apparent in their assertion that "Conspiracy I" ended with the arrest of Cabrera and others. (Joint Br. at 10). There is absolutely no evidence Cabrera was ever arrested in 1973. Indeed, he remains a fugitive to this date.

Second, even if the Court were to find that the conspiracy could be subdivided into the groups asserted by appellants, the operations were clearly an organized business venture which, based on evidence of a common aim and purpose, on the large quantities of cocaine imported and distributed and on their mutual dependence and assistance, comprised a single conspiracy.

The common aim of the conspiracy, which was to place cocaine into the hands of the ultimate consumer, permitted a finding of a single conspiracy. *United States* v. *Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975); *United States* v. *Sperling*, *supra*, 506 F.2d at 1340; *United States* v. *Agueci*, *supra*, 310 F.2d at 826. Indeed, as discussed above, importing and distributing large quantities of cocaine, even through two groups, does not negative a finding of a single conspiracy. *E.g.*, *United States* v. *Bertolotti*, *supra*, 529 F.2d at 154; *United States* v. *Tramunti*, *supra*; *United States* v. *Sperling*, *supra*; *United States* v. *LaVecchia*, *supra*, 513 F.2d at 1218. This was not an operation where one man could ensure its success. Each member was aware that its success required the combined efforts of many men and that the operation did not begin or end with those members with whom he had a direct relationship. *United States* v. *Agueci*, *supra*, 310 U.S. at 827.

Finally the evidence of mutual dependence and assistance between the two groups proved the existence of a single conspiracy. *United States* v. *Leong*, *supra* slip op. at 4351; *United States* v. *Bertolotti*, *supra*, 529 F.2d at 154; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1106; *United States* v. *Sperling*, *supra*, 506 F.2d at 340; *United States* v. *Mallah*, *supra*, 503 F.2d at 971.

Appellants concede that the groups they call "one" and "three" had a common direction from the "Bravo

Group" in Columbia. Further, except for Andries' testimony as to a single transaction with "Bravo II," the record is silent as to the source of cocaine in so-called segment two, although the jury could well have found that Cabrera continued to use Alberto Bravo. This evidence, plus the evidence of additional direction from Arturo Gonzalez, is sufficient evidence of mutual assistance from which to find the existence of a single conspiracy. *United States* v. *Mallah, supra*, 503 F.2d at 971; *United States* v. *Tramunti, supra*, 513 F.2d at 1106.

As conceded by appellants, Cabrera and Botero relied for their source of cocaine upon the same people as did Sarmiento, Mario Rodriquez and Mejias, namely Alberto and Bruno Bravo and Griselda Blanco. *United States* v. *Leong, supra*, slip op. at 4351. Furthermore, once the cocaine had arrived in the United States, the importers and wholesalers supplied each other. Thus, Mejias sold cocaine to Mario Rodriguez, Sarmiento, Cabrera, and Henry Rojas (Botellon), Sarimiento's stash keeper (*e.g.*, GX 328). In turn, Sarmiento sold cocaine to Mejias (No. 376, 5/13/74) and Mario Rodriguez (Tr. 5287-88, 5274-75, 5415-16; No. 511, 8/29/74). Moreover, Pepe Cabrera supplied Mario Rodriguez with cocaine. (No. 642, 9/25/74; 1089, 10/3/74; 727, 9/2/74).*

Evidence of mutual assistance was particularly strong with respect to the false travel documents. Thus, Carmen Caban described how Bernardo Roldan made false

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* Mutual assistance was not limited merely to providing cocaine to each other. Thus, Mario Rodriguez, Sarmiento, Mejias, Botero, Ruben Dario Roldan and Libardo Gill used each others' apartments and telephones to conduct their business (Tr. 5089-91, 5287-81, 5274-75, 5415-16, 5299-5300; Nos. 94, 5/6/74; 699, 9/1/74; 750, 9/3/74; 777, 9/3/74; 511, 8/29/74. In addition, a close associate of Botero using the names Guillermo Gonzalez and Jose Salazar used Maio's apartment as his residence in July, 1974 (No 44, 7/6/74; 465, 7/7/74).

passports (Tr. 1422) and the Government proved not only that appellants Parra and Gomez, Raul Diaz, Carmensa Gomez, and Mejias had false passports but also that those passports were altered in a fashion identical to that described by Carmen Caban (GX 23, 24, 27) and that those of Raul Diaz and Carmensa Gomez had been provided to them at Mario Rodriguez' expense by Bernardo Roldan after arrangements were made with him by Sarmiento for Mario Rodriguez (No. 119, 124, 7/1/74; 20, 6/29/74).

Common means used by the conspirators took other forms as well. In particular, the two groups used the same method of shipment, *United States* v. *Leong*, *supra*, slip op. at 4351. For example, young women were often recruited to carry cocaine through customs (Arecelli; Caban, Carmensa Gomez, Anne Sanjurjo, Rhonda Sue Shirah) and the shipments were hand-carried or brought through customs in accompanying baggage (Antonio Romero, Anne Sanjurjo, Arecelli, Appellants Parra and Gomez, Hurtado, Moreno, Carmensa Gomez, Daniel Torres). Moreover, the same types of devices were used to transport the cocaine such as body belts (Anne Sanjurjo, Hurtado, Carmensa Gomez), and shoes (Parra and Gomez, GX 52, 52A-B, 54, 54A-C). Indeed, an examination of shoes seized from Parra and Gomez while making a delivery to Botero and Cabrera shows them to be a sophisticated design specially constructed for smuggling and in that respect identical to shoes seized from a stash apartment of Sarmiento (GX 311A-D). Furthermore, the shipments were not made to New York City directly from Colombia but from there through Aruba (Carmensa Gomez), Germany (Daniel Torres), Toronto, Canada (Moreno), Los Angeles, California (Sanjurjo and Hurtado), San Antonio, Texas (Parra and Gomez) and Miami, Florida (Tr. 1167) and then to New York. Clearly, a single conspiracy

may have many different points of importation. *United States* v. *Leong*, *supra*, slip op. at 4351.

Members of the so-called two groups also used the same methods of distribution. *United States* v. *Leong*, *supra*, slip op. at 4351. Essential to their method of distribution was the use of different types of codes, one in particular of a more sophisticated design which Carmen Caban described and which frequently reappeared in taped conversations (Nos. 174, 8/20/74; 507, 8/29/74; 441, 7/6/74).*

Finally, the use by persons in both groups of this peculiar code provided the jury with more than sufficient evidence, by itself, from which they could infer that the persons who used it were participating in a single conspiracy. *United States* v. *Cirillo*, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Thus, all of the indicia traditionally used by this Court to determine the unity of a conspiracy were satisfied. The jury could—as they did—find that a single conspiracy was shown.

E. Appellants' arguments are without merit.

The discussion thus far refutes the principal arguments pressed by the appellants concerning the claimed failure of the Government to meet the traditional cri-

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* The code consisted of placing the sylable "CUN" or "CUNA" between syllables of a word so that "GANCHOS", Spanish for hangers, would be spelled "GANCUNACHOS" (Tr. 1289). This was not the only means of disguising words. Words were spelled backwards, rearranged, or letters switched; *e.g.*, "Tabogo" meant "Bogota" and "Letama" meant "Maleta", (Sapnish word for "suitcase").

teria of a single conspiracy. Two further arguments by the appellants are also without merit.

First, relying solely on *United States* v. *Bertolotti*, *supra*, 529 F.2d 149 (2d Cir. 1975), appellants argue that the three conspiracies existed because the indictment on which they were tried superseded earlier indictments. *Bertolotti* is inapposite. The conspiracy here can hardly be described as ". . . a product of the Government's imagination." *United States* v. *Bertolotti*, *supra*, 529 F.2d at 155. Moreover, in *Bertolotti*, the court found four conspiracies, only one of which ". . . resembled the orthodox business operation we have found to exist in narcotics conspiracies" and two of which ". . . could hardly be classified as narcotics transactions, for no drugs changed hands." *Id.* Here, of course, the evidence established a continuing business operation typical of narcotics conspiracies, consisting of all the alleged separate groups. Furthermore, there is no suggestion that the Government superseded any indictment simply in order to buttress the evidence underlying an earlier indictment.

In apparent conjunction with this argument, appellants attempt to analogize the superseded indictments in this case to a Government memorandum in *United States* v. *Bertolotti*, *supra*, 529 F.2d at 155, that strongly suggested that the reason for superseding earlier indictments there was to concoct a mass conspiracy trial, or the diagram of a conspiracy which the Government provided in *United States* v. *Miley*, *supra*, suggesting different groups. This view is ill-conceived and myopic. The three sperseded indictments themselves certainly do not provide the basis for drawing any similar inferences. Indeed, whereas the memo in *Bertolotti* was the foundation of motions for severance, no motions for

severance were made in this case based upon the three earlier indictments. The three indictments superseded in this case resulted from different sources of information who agreed to co-operate at different times.* Appellants cannot seriously contend that simply because the Government had different sources of proof that therefore the evidence proved separate conspiracies.**

In addition, the appellants contend that the Government somehow wanted a "mass" trial, and that this Court, as a matter of policy, should therefore reverse the convictions. This claim falls under the weight of the facts, since only four defendants were added to what would in any event have been a trial of eight defendants, making a total of twelve. This hardly changed the character of the trial to that of a "mass" conspiracy. The alternative of dividing the case into numerous separate

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* Indictment 74 Cr. 817 was based primarily on information obtained from William Andries and Leonel Fernandez. Indictment 74 Cr. 939 was based primarily upon the evidence obtained by the New York City Police Department during the long wiretap investigation which was the source of so much of the Government's proof at trial. Indictment 74 Cr. 1128 was based primarily upon information obtained from Carmen Caban and Detective Arthur Drucker.

** While the indictments on their face, with so many common lead defendants, the same crime committed in the same places, and manner over the same period of time, may suggest that the indictments should have been superseded and consolidated into one indictment before April 30, 1975, the three indictments were transferred from the two Assistant United States Attorneys who had presented them to the Grand Jury to the Assistant who tried this case only in January, 1975. In preparing for the trial of 74 Cr. 939, as a result of debrifing Carmen Caban, Rita Ramos, and the officers who conducted the underlying wiretap investigation and reading the transcripts of wiretap conversations, the existence of a single conspiracy incorporating the crimes alleged in the three indictments became apparent. Therefore, on April 30, 1975, the superceding indictment was finally obtained.

trials would amount to greatly increasing the total expenditure of judicial time by needlessly repeating many portions of the testimony (such as the descriptions of the core operators and the use of the codes) and subjecting many of the defendants to two or more trials. The appellants' claim, we submit, invites unnecessary chaos.

F. In any event appellants were not prejudiced.

Finally, even if this Court disagrees with our analysis and finds that some of the conspirators were not members of a single conspiracy, it does not follow that the judgment of conviction as to all—or any—of the appellants should be reversed. The crucial determination is whether there was a prejudicial variance between the conspiracy alleged in the indictment and the one proved at trial. *United States* v. *Calabro*, *supra*; *United States* v. *Agueci*, *supra*, 310 F.2d at 827. The appellants admit that the portions of the proof that they denominate "segment one" and "segment three" contained substantial indicia of unity, and argue particularly that the so-called "segment two" was entirely separate. See Joint Brief at 39. This argument ignores, however, the facts that, first, none of the appellants was included in the group that the appellants label "segment two" and, second, that even if the conspiracy had not been drafted formally to include those people as co-conspirators—and we reaffirm that the inclusion was entirely proper—virtually all of the proof of that part of the conspiracy would have been admitted at trial anyway. Such proof was relevant to show the nature of the rest of the conspiracy and the relationship among the other conspirators. See *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972) (proof of the "background" of a conspiracy); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975), *cert. denied*, — U.S. —, — U.S.L.W. —, (Dec. 8, 1975); *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*,

421 U.S. 950 (1975) (proof of "pattern of conduct"" of conspirators); *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3608 (April 26, 1976) (proof of relationship among conspirators). In particular, Andries' testimony served to corroborate the testimony of Caban, Leonel Fernandez and other with respect to dealings between Robinson, Cabrera and Botero. Furthermore, this Court has very recently reaffirmed that proof of "similar acts" of-co-conspirators not involving any defendant on trial is admissible to show the existence of the conspiracy charged in the indictment. *United States* v. *Araujo*, — F.2d —, Dkt. No. 76-1085, slip op. 5101, 5103 (2d Cir., July 26, 1976); see also *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973). Thus, it is clear that even if the Court were to accept the argument that the so-called "segment two" was not properly a part of the indictment, the proof introduced in support of that portion of the conspiracy would have been admissible anyway for the purpose of demonstrating the existence of the rest of the conspiracy, and the appellants were not prejudiced. *United States* v. *Miley*, *supra*, 513 F.2d at 1207.

Finally, the appellants vastly distort and overstate the context and impact of the testimony of Andries, who, after all, was simply another courier in the organization. While his history was concededly vile, the details of his life were elicited by, or at least in anticipation of defense counsel. See *United States* v. *Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969). Indeed, far from minimizing this "shocking" testimony, defense counsel referred to it again and again in summation. Furthermore, the testimony about guns and the amount of money handled by Andries was of a piece with similar evidence concerning other aspects of the conspiracy. Finally, his testimony about "rip-offs"—which appellants emphasize in transparent attempt to create a similarity with *United States*

v. *Bertolotti*, *supra*, 529 F.2d at 158, was hardly unique,* and, in any event, was introduced not as the object of the conspiracy, as in *Bertolotti*, but in direct relation to the importation of cocaine from Colombia to New York.

In sum, the evidence was clearly sufficient to show the existence of one conspiracy; even if there were more than one proven, the variance was not sufficiently prejudicial to require a new trial.

POINT XIII

Nothing said by the prosecutor in the opening, summation, or rebuttal summation merits reversal.

In a shotgun approach, virtually barren of case support, defendant Velez—joined by adoption by other defendants—challenges various remarks by the prosecutor that Velez contends fall into several categories of impropriety. As to each category, defendant Velez misreads or overstates the law. Just as significantly, he vastly exaggerates the content and impact of the prosecutor's statements, and neglects to assess the weight of the allegedly prejudicial argument measured against the back-drop of fourteen weeks of evidence.

The principal target of Velez' attacks is the prosecutor's comments on the failure of Velez and other defendants to introduce certain evidence at trial. (Velez Br. at 41-44). There is no claim that Government counsel commented on the defendant's failure to testify in his

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* There was evidence that Hamilton stole $2,500 from Sarmiento, and Caban testified that $200,000 was stolen from Cabrera. (Tr. 1433).

own behalf—indeed, Velez testified at length before the jury (Tr. 7296-7481).* Rather, Velez seeks to stretch the hornbook proposition that the Government must prove its case and a defendant need put in no defense, to a prohibition against the Government's commenting on the quality of the evidence actually offered by a defendant or on defendant's failure to adduce evidence to confirm or support a defense that he already has raised. No such prohibition exists.

This is not a case where the prosecutor's remarks directed the jurors' attention to the failure of a non-testifying dedenfant to adduce certain proof. See *United States* v. *Perez*, — F.2d —, Dkt. No. 75-1385, slip op. 3761, 3770 (2d Cir., May 17, 1976). Rather, the prosecutor fairly commented on the failure of a defendant to produce evidence that was highlighted by the defendant's own testimony. See *United States* v. *Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *petition for cert. filed*, No. 75-1554, 44 U.S.L.W. 3625 (U.S. April 26, 1976); *United States* v. *Deutsch*, 451 F.2d 98, 116-117 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Once a defendant interjects a defense, whether through counsel's questions, evidence or argument, the Government is free to comment upon its plausibility as well as upon the strength of its evidentiary support. See *United States* v. *Lipton*, 467 F.2d 1161, 1168, n.15 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). Further, nothing prevents the prosecutor from "arguing the strength of his case by stressing the credibility and lack

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* Velez' brief misleadingly suggests that in thirty-nine instances the trial court admonished "the prosecutor to desist from making improper comment on an accused's right to remain silent." (Velez Br. at 41, n.1). An examination of these citations reveals that none in any way mentions the defendant's testimony or lack thereof, and only a few even concern the Government's expectation of what the defense case would be, whether by testimony that the Government expected the defense to elicit in cross-examination or by evidence directly offered.

of contradiction of his witnesses", *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970), or from commenting "upon the defense's failure to call witnesses [other than the defendant] to contradict the Government's case." *United States* v. *Lipton*, *supra*, at 1168. *See also*, *United States* v. *Gray*, 464 F.2d 632, 637 (8th Cir. 1972).

Here, none of the prosecutor's remarks referred even indirectly to any defendant's failure to testify, since each disputed remark referred to potential evidence which, if it existed, could have been introduced without requiring any defendant to testify.* Any confusion from which the jurors could conceivably have suffered was cured by the trial judge's instructions that a defendant need not put in any evidence (*e.g.*, Tr. 88, 7956, 8450, 8549). See *United States* v. *Dioguardi*, *supra*, 492 F.2d at 51; *United States* v. *Lipton*, *supra*, 467 F.2d at 1169.

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* As part of his defense, defendant Jorge Gonzalez introduced the testimony of Jose Betancort, which referred to jewelry allegedly sold by Gonzalez on consignment for Betancort's firm (Tr. 7578). On cross-examination, Betancourt testified that there were records kept of the transactions, but that he did not have them (See Tr. 7585, 7588). It was the absence of those records—obviously in the custody of a non-defendant—upon which the prosecutor commented. (See Velez Br. at 43). Similarly, records or other proof of Bruno Bravo's alleged money changing business could have been produced without requiring the testimony of any defendant.

The only possible exception is the reference to receipts that Velez contended he had, but which he failed to produce, for the alleged purchase of horse supplies for the Bravos in 1974. Since Velez actually testified, he waived any Fifth Amendment privilege from producing these documents. In any event, the alleged documentary confirmation could well have come from the store from which the supplies were purchased, rather than Velez. (Velez Br. at 41; Tr. 7450-7453).

Velez next challenges the prosecutor's allusions in his opening (Velez Br. at 44) and summations (Velez Br. 46, 50) to the narcotics problem in the United States and its effect upon the community, to the quantity of drugs involved in defendants' actions, and to defendant's position in the hierarchy of this illicit business. Particularly in the context of the record before this jury, these remarks were not improper. In *United States* v. *Ramos*, 268 F.2d 878, 880 (2d Cir. 1959), this Court observed:

> "[W]e think it not improper for Government counsel in the prosecution of such a case, at least within reasonable limitations, to emphasize the importance of the case by calling attention to the unsavory nature and the social consequences of illicit traffic in narcotics—consequences far more serious than those flowing, for instance, from illicit traffic in lottery tickets or in untaxed liquor."

See also *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975). See generally, *United States* v. *Clark*, 525 F.2d 314 (2d Cir. 1975).

Velez also asserts that the prosecutor sought to inject into the trial his personal opinion of the defendants' guilt and of the credibility of the Government's witnesses. Not even in the abstracted comments quoted by Velez was any attempt made to convey the improper impression that counsel had in his possession information which the jury did not have which demonstrated guilt or supported the Government witnesses. Rather, the prosecutor simply argued that the jury should draw certain inferences from the proof in the record, a perfectly permissible purpose of summation.* See *Lawn* v. *United States*, 355 U.S. 399,

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* This Court has noted that prosecutors in their remarks to the jury are not limited to being "mere automatons," but may, within "broad limits," see *United States* v. *Geary*, 515 F.2d 130,

[Footnote continued on following page]

359-60 n.15 (1958); *United States* v. *Canniff*, 521 F.2d 565, 571 (2d Cir. 1975), *cert. denied sub nom Benigno* v. *United States*, — U.S. —, 44 U.S.L.W. 3398 (January 12, 1976); *United States* v. *Hysohion*, 439 F.2d 274, 277-279 (2d Cir. 1971). Velez particularly highlights the prosecutor's comments about the Government's cooperating witnesses. (Velez Br. at 46-48). The Government's efforts to explain to the jury the need to take witnesses as they come and to argue that prior bad acts do not necessarily lead to perjury on the witness stand did not rise to the level of forbidden endorsement of Government witnesses. *United States* v. *Davis*, 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).*

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140 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), urge the jurors to draw inferences from the facts in the record. *United States* v. *Wilner*, *supra*, 523 F.2d at 73. Furthermore, brief conclusory arguments made in the opening in expectation of the proof at trial also are not cause to reverse. See *United States* v. *Meisch*, 370 F.2d 768, 773 (3d Cir. 1966).

* Indeed, Government counsel has the right to put the cooperation of accomplice witnesses, especially those who have been covered with invective by defense counsel, in proper perspective. *United States* v. *Aloi*, 511 F.2d 585, 597-98 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States* v. *Araujo*, — F.2d —, Dkt. No. 76-1085 slip op. (2d Cir., July 26, 1976). Moreover, had there been any inappropriate zeal, it would have been an excusable "response to excesses on the part of defense counsel" who excoriated Andries, Caban, Fernandez and Ramos (*e.g.*, Tr. 7990-7994, 8010-8012, 8193-8204, 8241-8243, 8255, 8386-8392). *United States* v. *Canniff*, *supra*, 421 F.2d at 571. See *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

Also appropriate, in the context of the proof at trial, were the mild—and accurate—characterizations of Mr. Velez, such as "at the top" and "moneyman" that the prosecutor employed. (See Velez Br. at 49). In the first place, their innocuousness belies the charge that they were inflammatory. More importantly, the testimony supported the contention that Mr. Velez did play the

[Footnote continued on following page]

Finally, the effect of all the remarks Velez complains of—taken singly or together—must be evaluated in light of the judge's repeated instruction that counsel's arguments were not evidence (*e.g.*, Tr. 32, 7444, 8561). See *United States* v. *Davis*, *supra*, 487 F.2d at 125. It must also be measured against the weight of fourteen weeks of evidence. Compare *United States* v. *Burse*, 531 F.2d 1151, 1155 (2d Cir. 1976). These relatively few remarks, interpersed among roughly forty pages of the Government's opening remarks and the more than 250 pages of its summation and rebuttal summation—that were themselves short compared to the factual presentation which they summarized—simply could not have had any material effect on the jury's deliberations.

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businessman in the conspiracy. See *Myers* v. *United States*, 49 F.2d 230, 232 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931). Similarly, the Government offered to prove the contention—advanced only briefly before the jury in the course of a fourteen week trial—that someone had committed a murder in furtherance of the conspiracy. While under *United States* v. *Bynum*, 485 F.2d 490, 498-999 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), this evidence should have been admissible, the trial judge kept it out to preclude even the faintest possibility of any unnecessarily prejudicial inflammation. Especially since the brief, isolated reference in the opening (Tr. 84) did not accuse any of the defendants who were actually on trial of committing the murder or being involved in its planning, the significance of the remark in the course of a lengthy trial was minimal. Since the Government was prepared to prove the factual accuracy of the reference, it is hardly a cause for reversal.

POINT XIV

The appellants' claims with respect to the court's charge are without merit.

Leon Velez raises several objections to the Court's charge (Velez, Point IV).* Many of those objections are based on strained constructions of the charge and are clearly afterthoughts, raised now for the first time. Neither these, nor others raised below are meritorious.**

For example, Velez asserts that "[a]ll of the Court's practical examples of legal concepts are exceptionable" (Velez Br., Point IV, p. 54). Yet, except for the District Court's reference to "the hands of Mr. Costello" when instructing the jury on assessing credibility (Tr. 8563) and its use of the example of a cymbal player in a symphony orchestra to illustrate the effect of participation in a conspiracy (Tr. 8582), no objections were raised below to the practical examples used by the Court. Even now, Velez offers neither citation nor explanation to demonstrate precisely how those illustrative examples are supposedly objectionable—nor can he. Each of the examples used by the Court accurately

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* Appellant Sarmiento joins in this point of Velez' brief (Sarmiento Br., Point V). In addition, Appellants' Joint Brief (Point II) raises objections with respect to the brevity of the Court's charge and the Court's failure to marshall the evidence.

** Of course, those portions of the charge to which no objection was made at trial cannot be attacked on appeal. See Rule 30 of the Federal Rules of Criminal Procedure. This Court has recently reaffirmed the requirement that a contemporaneous objection to an instruction must be made. *United States* v. *Nathan*, Dkt. No. 75-1421, slip op. 4201, 4208 (2d Cir., June 16, 1976); see also *United States* v. *Ingenito*, 531 F.2d 1174, 1176 (2d Cir. 1976); *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

illustrated a legal concept germane to the case, in terms readily understandable to the jury.

With respect to the Court's reference to the hands of Mr. Costello during the Kefauver hearings, the context makes it clear that the inflammatory effect attributed to the example by Velez simply could not have occurred. Even assuming that the jurors were sufficiently versed to view this passing reference as an illusion to Frank Costello, there was certainly no implication that defendants could or should be equated or associated with Frank Costello. In describing how the jury could use a witness' physical gestures to assess credibility, the Court was clearly referring to witnesses in general—including those of the Government.*

Finally, the Court's example of a cymbal player in a symphony orchestra accurately and vividly illustrated the well-settled principle that a conspirator who plays only a minor role in the conspiracy is as much a part of it and liable for its activities as one of the conspiracy's major actors. See, *e.g.*, *United States* v. *Kahaner*, 317 F.2d 459, 469 n.4 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *United States* v. *Sansone*, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956).**

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* Approximately one hundred five witnesses testified for the Government during the trial. The defendants presented approximately seven witnesses. Furthermore, immediately before he made the Costello analogy, Judge Cannella specifically referred to certain Government witnesses as appropriate objects of the juror's duty to weigh credibility. If anything, the association with Frank Costello was harmful to the principal Government witnesses, many of whom were admitted participants in the narcotics conspiracy.

** If anything, to the extent that the cymbal player is a "contractual member" of the symphony (Velez, Point V, p. 55), the [illegible] was more favorable to defendants than they deserved.

Velez raises four other objections with respect to the Court's charge: (1) that the charge improperly shifted the burden of proof; (2) that the Court's reference to the history of criminal drug legislation was inflammatory; (3) that the Court failed to give a character witness charge and (4) that the Court gave an improper "all or nothing charge" on the single-multiple conspiracy issue.* Those objections likewise, cannot withstand analysis.

The Court's instruction that a defendant "may rely upon evidence brought out by the cross-examination of the witnesses for the government" (Tr. 8549) did not shift the burden of proof to any defendant. (Velez Br., Point IV, p. 52).** *United States* v. *Muckenstrum*, 515 F.2d 568, 571 (5th Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States* v. *Prince*, 515 F.2d 564, 566-67 (5th Cir.), *cert. denied*, — U.S. — (1975). Moreover, the Court repeatedly instructed the jury—both during the trial and in its charge—that the burden of proving guilt beyond a reasonable doubt was on the Government and never shifted (*e.g.*, Tr. 8549, 8581, 8587).***

Appellants assert that the Court erred in briefly relating to the jury the fact that the statute that defendants were charged with violating was the most recent in a series of statutes enacted in an attempt to deal with this nation's well-known and well-documented

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* Defendant Rolden also raises this issue. (Rolden Br. at 29).

** No objection to this portion of the charge was made in the District Court, and thus, as noted above, it may not be attacked on appeal.

*** In any event, only appellant Velez raises this issue. Velez not only cross-examined witnesses, but called two character witnesses and testified himself. Even assuming *arguendo* that the charge was improper, Velez clearly could not have suffered any prejudice.

drug problem. Again, defendants cite neither authority nor offer explanation to support their conclusion that these references were inflammatory. Furthermore, it belies belief to assume that jurors selected from citizens of the Southern District of New York were previously unaware of the "drug problem" and the efforts of Congress to combat it. Taken in context, the Court's short introductory statement was no more than a simple, informative statement of the law emphasizing the importance of the case—emphasis which was entirely proper. See, *e.g.*, *Spells* v. *United States*, 263 F.2d 609, 610 (5th Cir.), *cert. denied*, 360 U.S. 920 (1959).*

In addition, appellants assert that the Court's charge on the single-multiple conspiracy issue was the "all or nothing charge" condemned by this Court in *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). As this Court made clear in *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), the crucial factor to be considered in evaluating whether a single-multiple conspiracy charge is proscribed by *Borelli* is whether the charge, viewed as a whole, adequately instructed the jury that an individual defendant who was not a knowing participant in a single conspiracy must be acquitted. *United States* v. *Bynum*, *supra*, 485 F.2d at 497. Judge Cannella's charge clearly met that standard. The Court's charge is replete with instructions to the jury to focus on each defendant separately in determining inno-

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* Defendant Velez also asserts that the Court erred in failing to give a character witness charge. The record, however, reflects that the Court gave the jury the very character witness charge approved in prior cases by this Court (Tr. 8573-74). *Michaelson* v. *United States*, 335 U.S. 469, 476 (1948); *United States* v. *Minieri*, 303 F.2d 550, 555 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *United States* v. *Kelly*, 349 F.2d 720, 765 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States* v. *Kahaner*, *supra*, 317 F.2d at 471.

cence or guilt (Tr. 8547, 8548). There is simply no portion of the charge—and indeed appellants point to no particular language in support of their contention that this was an "all or nothing" charge—that could conceivably lead the jury to believe that they could not acquit one defendant without acquitting all. Given those repeated cautionary instructions, the Court's charge was entirely proper. *See e.g., United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

Moreover, since those cautionary instructitons were duly given and emphasized, it was not error as appellants charge for the Court to refrain from marshalling the evidence. The decision whether to marshall the evidence is one entrusted to the sound discretion of the district court. *United States* v. *Quercia*, 289 U.S. 466, 469-70 (1933); *United States* v. *Tramunti*, 513 F.2d 1087, 1[illegible] (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Kahaner*, *supra*, 317 F.2d at 479 n. 12. In view of defendants' repeated objections to the Court's marshalling the evidence (Tr. 6546, 6918) and their failure to submit written summaries of their contentions as requested by the Court, that discretion was not abused. This failure to come to the aid of the Court is particularly significant in the context of this case. If the Court had marshalled the evidence, as some appellants now claim it should have done, it is inevitable that they thereupon would have complained of the manner in which it was marshalled. As this Court has recently noted, "even the most meticulous effort to balance a summary of the evidence inevitably will be met with a claim of distortion". *United States* v. *Wiener*, 534 F.2d 15, 18 (2d Cir. 1976), *petition for cert.; filed*, No. 75-1548, 44 U.S.L.W. 3625 (U.S. April 24, 1976) Judge Cannella was clearly justified in declining to open himself to such criticism when he was

totally unaided by defense counsel, and, indeed, when the question of marshalling was opposed by them.*

Finally, Roldan argues that Judge Cannella failed to properly instruct the jury regarding individual membership in the conspiracy. (Roldan Br. at 29). His argument fails to take into account that Judge Cannella did charge the jury on individual membership in the conspiracy (Tr. at 8579 *et seq.*) in a way previousy approved by this Court.** Moreover, Roldan has waived his right to raise this question on appeal by his failure to object to Judge Cannella's charge or to request an alternative or additional charge.

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* Defendants rely on *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965). In that case, this Court, while noting that it would have been wiser for the district court to marshall the evidence in a single-multiple conspiracy case over the defendants' objections, stated that it was not reversible error unless coupled with an "all or nothing charge". As demonstrated above, no such charge was given here.

** In his charge on individual membership, Judge Cannella charged the jury that the Government must prove beyond a reasonable doubt that the defendant had knowledge of some of the purposes of the conspiracy and acted with intent to advance those unlawful purposes (Tr. 8579, 8581). He noted that knowledge without participation is not sufficient to constitute membership (Tr. 8579), but that a defendant need not know every member, detail, or means of the conspiracy to be a member therein (Tr. 8580). This charge has been approved in a number of cases. *E.g.*, *United States* v. *McKnight*, 453 F.2d 817, 819 (2d Cir. 1958); *cf. United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v *Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States* v. *Noah*, 475 F.2d 688, 697 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973).

POINT XV

Judge Cannella properly sentenced Velez.

Velez argues that his sentence of five years imprisonment, a $5,000 committed fine and three years (mandatory) special parole was "impermissible," although he fails to support that conclusion either with argument or legal authority. (Velez' Br., Point V at 59). Clearly Judge Cannella imposed a sentence well within the broad range of his discretion.*

Velez apparently bases his claim of error on misstatements of fact in the report of the Probation Department and on an alleged "mechanical approach" to sentencing (Velez Br. at 60). His argument has no merit. Not only were inaccuracies in the probation report corrected on the record prior to Velez' sentence (3/1/76 Tr. at 32 *et seq.*), but, as Velez concedes (Velez Br. at 59), Judge Cannella stated he would disregard such portions of the report in sentencing Velez (3/1/76 Tr. at 64). As this Court has recently noted, an appellate court will not probe behind reasons given by the District Court for the sentence imposed by it, *United States* v. *Herndon*, 525 F.2d 208 (2d Cir. 1975), nor should it, we submit, assume that the trial court considered something that it explicitly said it did not.**

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* Title 21, United States Code §§ 845 and 963 permit a sentence as great as 15 years imprisonment and a $25,000 fine, and require that a special parole of a minimum of three years be imposed.

** Velez' argument that Judge Cannella employed a mechanical approach to sentencing is equally without substance. In sentencing Velez, Judge Cannella heard defense counsel's argument, familiarized himself with defendant's background, and considered

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Velez, relying on *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), also seems to suggest that Judge Cannella should not have denied his application for a revised Probation Department report. His argument is frivolous. This case presented none of the "unusual circumstances" which moved the *Rosner* Court. In that case, the Government submitted a memorandum on Rosner's sentence that the defendant was unable to see or review before the day of sentence. This Court remanded for resentencing to allow Rosner an opportunity for a "verbal explanation or comment." Here, Velez and his counsel were given sufficient time to familiarize themselves with and correct the probation report and to present their own written and oral version of the facts (3/1/76 Tr. at 32-34). *United States* v. *Aloi*, 511 F.2d 585, 601 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975). Moreover, Judge Cannella, who had presided at trial, stated that

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such factors as the defendant's age, religious beliefs, and the absence of any previous criminal conviction, as well as letters submitted in his behalf (3/1/76 Tr. at 67-69). Moreover, the Court was aware of the testimony of Velez' character witnesses at trial. Thus, Judge Cannella's approach was not mechanical but was based upon all those factors that should properly be considered in imposing sentence.

Velez has failed to argue, much less establish, that Judge Cannella relied on any improper considerations, *see United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, *C.J.*, concurring), or materially incorrect information, *see United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970). Thus, since Velez received a sentence well within the statutory limits, his sentence is not reviewable. *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973) (and cases cited therein). *Accord Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker*, 404 U.S. 443 (1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *United States* v. *Tramunti*, *supra*, 513 F.2d at 1120; *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975).

he would disregard those matters counsel alleged to be falsely stated in the probation report concerning Velez' role in the conspiracy and instead would rely upon his assessment of the entire record. Finally, it should be noted that the alleged inaccuracies were virtually all matters relating to the evidence at trial on which the Court could make a fully informed judgment without the need for a probation report.

POINT XVI

This Court should not give Parra and Gomez credit for time spent in federal custody for their arrest and conviction for previous and separate offenses committed in Texas.

Parra and Gomez were each sentenced to ten years in prison. They contend that the time they had already spent in prison under sentence from a former conviction should be deducted from their present sentence. This contention is incorrect.

Title 18, United States Code, Section 3568 requires that the Attorney General shall give any person convicted of an offense "credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." The defendants Parra and Gomez contend that the award of credit is not a judicial act but is an administrative act. *Lee* v. *United States*, 400 F.2d 185, 189 (9th Cir. 1968). Given that proposition, their application to this Court is premature, as the Attorney General, who is charged with the duty of crediting time served,* has not

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* This power has been delegated to the Bureau of Prisons.

been petitioned by them to make a decision concerning whether credit will or will not be given for any time served. "Before [a petitioner] is entitled to relief . . . it must appear that the Attorney General or the Director of the Bureau of Prisons has refused to afford him credit to which he is legally entitled. . . . [A petitioner] should therefore exhaust the administrative means at his disposal before judicial review will be appropriate." *McCune* v. *United States*, 374 F. Supp. 946, 949 (S.D.N.Y. 1974) quoting *Soyka* v. *Aldredge*, 481 F.2d 303, 306 (3d Cir. 1973); *Wolcott* v. *Norton*, 365 F. Supp. 138, 139 n.1 (D. Conn.), *aff'd*, 487 F.2d 513 (2d Cir. 1973), *cert. denied*, 414 U.S. 1114 (1973); *Pace* v. *Clark*, 453 F.2d 411 (5th Cir. 1972); *United States* v. *Morgan*, 452 F.2d 1388 (5th Cir. 1970). Since administrative remedies should be the appellants' first recourse, appellate review of the issue of credit is clearly inappropriate at this time.

However, should this Court now reach the merits, Judge Cannella's sentence was clearly proper.

First, Parra and Gomez were in custody from August 1973, pursuant to a federal sentence and not because of their inability to make bail in this case, and, accordingly, are not entitled to credit under Section 3568.*

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* "Jail credit will not be applied to any portion of time spent serving another sentence, either federal or non-federal except that time spent serving a sentence that is vacated will be creditable toward another sentence if the other sentence is based on the same charges that led to the prior vacated sentence. Jail credit is intended to relieve any inequity that may result because of failure to make bail due to indigency and to consider time actually spent in jail awaiting trial on certain charges the same as time spent after sentencing. When the failure to make bail due to indigency is a moot point, *e.g.*, when another sentence is operative for the period of time in question, and any bail would not result in a change in custody status, then applying jail time would be giving double credit, i.e., credit for two separate and distinct sentences for the same period of time, infringing into the authority of 18 U.S.C. 3568 to effect sentences." Federal Prison Policy Statement No. 7600.59 p. 2-3 (May 27, 1975).

Second, even if credit could be given for time being served under a prior federal sentence, that earlier sentence would have to be so construed as to permit a finding that Parra and Gomez were "in custody in connection with the offense or acts for which sentence was imposed" by Judge Cannella, and there is no basis for such a construction in this case. As Judge Cannella correctly concluded the offense for which Parra and Gomez were convicted in New York was significantly different from the single act for which they had previously been arrested, convicted, and sentenced.*

Counsel for Parra and Gomez cite no case supporting their position that they are entitled to credit against the sentence imposed below for time served on the Texas sentence. In fact the decided cases indicate otherwise.

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*As Judge Cannella stated, the defendants were tried in Texas for "that single, isolated, solitary act of bringing into Texas from outside of the United States . . . cocaine. The [present] conduct . . . is not a single, solitary incident. It is a chain of events that goes over a course of years . . . and actually the punishment in this case should be greater than in a substantive crime . . . . [The substantive crime and the conspiracy] are two separate crimes" (3/5/76 Tr. at 31-4).

Moreover, the legislative history of 18 U.S.C. § 3568 makes clear that the word "acts" was added to the section to take care of two situations, neither of which is present here, where credit should be given even though the offenses resulting in conviction was different from that of arrest.

> "The purpose behind this amendment is to cover a condition where the defendant may have been arrested for a crime but subsequently is convicted of a lesser crime; thus under the amendment even though convicted of a lesser crime, he is given credit for the time spent in custody while awaiting trial on the charge of a greater crime. It would also permit the giving of credit for time spent in custody while awaiting trial where a defendant may have been originally arrested and held in custody on a state charge

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In *Fontaine* v. *United States*, 434 F.2d 1310 (5th Cir. 1970), the defendant had been in state custody for the theft of an automobile at the time when he was sentenced in federal court for transporting the same stolen automobile in interstate commerce. The Fifth Circuit held that the defendant was not entitled to credit for time spent in state custody, stating that though the same automobile was involved in both offenses, the "sameness" of the offenses ended with that fact. The court held that the second offense was "in no way dependent udon the theft of the automobile . . . the acts necessary to constitute the two offenses [were] entirely different." *Id.* at 1311. The single act of importing cocaine for which the defendants were convicted in Texas and even the conspiracy to bring in cocaine that one time for which they were originally arrested) and the broad conspiracy to import cocaine into New York for which they were convicted below, are clearly far more distinct for purposes of Section 3568 than the offenses found to be different in *Fontaine.** Accord *Gilbert* v. *United States*, 299 F. Supp. 689 (S.D.N.Y. 1969); *Wilson* v. *Hen-*

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and eventually turned over to the Federal Government for prosecution of a Federal violation." House Report 1541, 90th Cong., 2d Sess. 1968 U.S. Code Cong. & Admin. News, pp. 2294-95 (1966). See also p. 2306.

However, nothing in the legislative history indicates a willingness to give so broad a meaning to the word "acts", as defendants argue, that double credit would have to be given for time served after a valid federal sentence had begun.

* Under present Bureau of Prisons policy, the facts of *Fontaine* might be considered the same act or offense. Bureau of Prisons, Policy Statement No. 7600.59 p. 4 example (21). However, other examples given in the policy statement indicate clearly that the facts of the present case would no be considered o be the same act or offense. Bureau of Prisons Policy Statement, No. 7600.59 p. 4, examples (3)-(5). At any rate, that issue should be decided by the Bureau of Prisons, not by this Court in the first instance.

derson, 350 F. Supp. 249 (N.D. Ga. 1972); *United States* v. *Beeker*, 275 F. Supp. 608 (D. Md. 1967); *Dillinger* v. *Blackwell*, 277 F. Supp. 389 (N.D. Ga. 1967).

Accordingly, it appears that Judge Cannella would have been in error had he made the sentences he imposed retroactive to an earlier time, since before March 5, 1976, the defendants were not in custody for service of this sentence and the act expressly forbids prescribing "any other method of computing the term." Defendants are asking for nothing less than to thwart Judge Cannella's express intention in properly sentencing as he did * and to receive double credit to which they are not entitled. See *Siegel* v. *United States*, 436 F.2d 92 (2d Cir. 1970); *Jefferson* v. *United States*, 389 F.2d 385 (2d Cir. 1968).

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* Parra and Gomez speculate that if they had been convicted of the present offense along with their Texas conviction they would have received concurrent ten year sentences running at the same time. However, it is just as likely that had the Texas judge known Parra and Gomez were involved as repeated courriers in a major conspiracy, he might have given them concurrent thirteen year sentences, which Judge Cannella, in effect, gave Parra and Gomez. In fact, the Texas Judge might have given them consecutive ten year sentences for substantive and conspiracy counts which would have been perfectly proper. *United States* v. *Accardi*, 342 F.2d 697, 701 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965). To the extent that there is any ambiguity of the starting date in the written judgment of the court, even assuming that the court had the power to decide the starting date of sentence, Judge Cannella's oral expression of the intention to have the starting date be March 5, 1976 would control. *United States* v. *Marquez*, 506 F.2d 620 (2d Cir. 1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)

COUNTY OF NEW YORK)

PETER M. BLOCH, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of August, 1976 he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

SEE RIDER

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Peter M. Bloch

Sworn to before me this

9th day of August, 1976

Maria A. Morales

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